UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION[1]

Last October, this Court held that the State "cannot deny restoration of a felon's right to vote solely because the felon does not have the financial resources to pay [LFOs]," ECF 207 at 55.[2] Since then, Defendants have taken no action to ensure returning citizens[3] can vote regardless of their financial resources. Instead, the Governor has stated that no changes will be made to SB7066 until litigation has been resolved, and has pushed to return Florida to the 150-year-old system Floridians squarely rejected in November 2018.

The parties are now before the Court on the State Defendants' Motion for Summary Judgment, filed February 18, 2020, ECF 267-68. Plaintiffs oppose the motion, which rests on the same legal theories that have already been squarely rejected by this Court and Eleventh Circuit. Defendants ignore numerous contested material facts surrounding the creation, implementation, and effect of SB7066. For these reasons, Defendants' Motion should be denied on all counts.[4]

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[1] Plaintiffs file this consolidated brief in opposition to Defendants' Motion for Summary Judgment ("Motion"), but each Plaintiff group joins only those parts of the brief related to their alleged claims.

[2] Documents filed previously in this Court are cited as "ECF __."

[3] This brief refers to persons with felony convictions as "returning citizens."

[4] Plaintiffs do not address Defendants' arguments whether SB7066 violates Article 4, Section 4 of the Florida Constitution or the applicability of a Writ of Mandamus (Mot. at 59-61), or *Mendez*/*Jones* Plaintiffs' section 2 claims, which *Mendez*/*Jones* Plaintiffs intend to dismiss as of this filing, and are seeking the position of Defendants about a stipulation of dismissal of these claims.

COUNTERSTATEMENT OF MATERIAL FACTS

Defendants' Statement of Material Facts fails to support their Motion.

First, Plaintiffs dispute two of the five material facts Defendants enumerate:

1. Defendants aver it is undisputed "Senate Bill 7066 and Amendment 4 each require *payment* of all outstanding financial obligations before re-enfranchising a felon." Mot. at 11 (emphasis added). Not so. The Florida Supreme Court expressly declined to interpret the term "completion"—and whether that always requires "payment" —in Amendment 4. *See* Advisory Op. at 4–5 ("[T]he Governor requests advice solely as to the narrow question of whether the phrase 'all terms of sentence' includes LFOs ordered by the sentencing court. We answer only that question."). Indeed, at oral argument, the Governor's counsel disclaimed any request for an advisory opinion on the meaning of "completion." *See* ECF 121 at 19 n.12 (citing Senate Hr'g Tr. at 6:35:50-6:38:38, May 2, 2019). Secretary Lee conceded Amendment 4 does not require payment of LFOs for "completion" of a criminal sentence. *See* ECF 207 at 38-39. SB7066 itself does not always require payment of LFOs. *Id.*

2-4. Plaintiffs agree no party has directly challenged the constitutionality of Amendment 4 and Defendants correctly identified which parties brought intentional race discrimination and Nineteenth Amendment claims.

5. It is far from undisputed "[t]he legislative record for Senate Bill 7066 includes no evidence of discrimination." Mot. at 12. As described below, Plaintiffs raise genuine issues of material fact as to the legislature's motive in passing SB7066, and such highly fact-sensitive inquiries are ordinarily unsuited to summary judgment.

Second, Defendants' Statement of Material Facts largely ignores the voluminous factual record the parties have developed through discovery and at the preliminary injunction hearing bearing on the merits of Plaintiffs' claims. Without intending to provide an exhaustive account of the factual record, Plaintiffs state here the facts most relevant to their opposition to Defendants' Motion:

1. Before Amendment 4's enactment, over 1 million Floridians were permanently disenfranchised due to a felony conviction. *See* Ex. 11 at ¶21.[5]

2. Before Amendment 4, more than one in five of Florida's Black citizens could not vote because of a felony conviction. Although Black citizens only comprise 16% of Florida's population, they accounted for 32% of citizens disenfranchised due to a felony conviction. Ex. 12 at ¶206.

[5] References to "Ex." refer to the indicated exhibit attached to the Declaration of David Giller in Opposition to Defendant's Motion for Summary Judgment filed contemporaneously herewith.

3. Over 77% of returning citizens have outstanding LFOs. Ex 11 at ¶22. A majority of those returning citizens are unable to pay back their LFOs. *Id.*, ¶¶34–38, 42, 46.

4. The Florida legislature knew or should have known SB7066 would disproportionately impact Black citizens. Ex. 12 at ¶¶30, 145, 149, 200. Black legislators and other individuals and organizations, including the NAACP, explicitly warned the legislature SB7066 would "disproportionately impact low-income and racial minority returning citizens." Letter from Leah Aden et al., Deputy Dir. of Litig., NAACP-LDF, to the Fla. House of Representatives (Apr. 22, 2019), https://www.naacpldf.org/wp-content/uploads/House-of-Representatives_2019-04-22_NAACP-LDF-and-FL-NAACP-Opposition-to-HB-7089_final.pdf ("Aden Letter").

5. Ample evidence in the record demonstrates the legislature acted with a discriminatory purpose by enacting SB7066. *See generally* Ex. 12; *see also* Ex. 2 at 74:2–77:16; 83:7–24; Ex. 9 at 25:18–27:22; 28:12–29:15, 48:24–52:18; Ex. 1 at 21:7–23:21; 25:5–17; 27:11–28:17; 52:14–55:23; 57:12–58:12; 79:14–80:23.

6. The State of Florida uses revenue generated from payment of LFOs to fund its criminal justice system and the State more broadly. LFOs—including restitution, fines, fees and costs—are enforced contributions designed to produce revenue for Florida in substantial quantities. *See e.g.*, Fla. Stat. §§ 775.083(1), 142.01,

775.089(1)(a)(2), 960.17, 960.21, 215.20; *see also* Ex. 24; *see also* Ex. 14 ("OPPAGA Report"). Under Florida statute, clerks of the court must distribute "the cumulative excess of all fines, fees, service charges, and costs retained by the clerks of the court" to the Florida Department of Revenue for distribution. *See* OPPAGA Report, 4 (citing Fla. Stat. § 28.37(3)(a)). This excess becomes part of the General Revenue Fund and is used to fund other areas of state government, including those unrelated to criminal justice. For the fiscal year 2017-2018, over $113 million in funds collected from LFOs were provided to the General Revenue Fund. *Id.* at 11.

7. Defendants provided no guidance to the Supervisors of Elections across the State regarding how to implement SB7066's LFO provisions since SB7066's enactment. *See* Ex. 7 at 236:23-237:3, 265:5-9, 330:13-23, 333:10-24; Ex. 10 at 81:25-83:11, 104:20-24; Ex. 3 at 84:18-85:1, 85:12-1388:14-15, 89:24-90:05; Ex. 5 at 45:25–46:8. SB7066 is being interpreted differently across different counties. *See id.* at 126:4–18; Ex. 10 at 104:25–105:6; *see also* Ex. 25.

8. As early as 2016, Florida officials knew there were no reliable, publicly available sources for determining whether individuals have outstanding LFOs, whether they have paid their LFOs, or whether their LFOs are disqualifying, and this remains the case today. *See* Ex. 13 at 6; Ex. 12 at 22, 169, 173, 211. It is also not possible for a returning citizen to pay only disqualifying LFOs in order to become eligible to register to vote and vote. *Id.*

9. The State has not sought a legislative solution since this Court ordered a preliminary injunction on October 18, 2019. The State declared it will not do so. *See* Lawrence Mower, Amend. 4 won't get fixed in Florida. Here's why., Tampa Bay Times (Feb. 5, 2020) (https://www.tampabay.com/florida-politics/buzz/2020/02/05/florida-felons-still-cant-vote-as-2020-election-looms-heres-why/).

10. SB7066 established a Restoration of Voting Rights Work Group ("Work Group"), which submitted a report with non-binding recommendations in November 2019. The State has taken no steps to execute any of the recommendations put forth by the Work Group, including recommendations to consolidate relevant data, to identify sources of information about restitution, or to provide individuals with an opportunity "to demonstrate a partial or full inability to pay outstanding [LFOs] and obtain a judicial determination on ability to pay." Ex. 7 at 309:2–311:5, 311:17–314:19, 315:4–316:22.

SUMMARY JUDGMENT STANDARD

Defendants must demonstrate "there is no genuine issue as to any material fact" and they are "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This Court must view all evidence, and all factual inferences reasonably drawn from the evidence, "in the light most favorable" to Plaintiffs. *Hairston* v. *Gainesville Sun Publ'g Co*., 9 F.3d 913, 918 (11th Cir. 1993); *see also Bischoff* v. *Osceola County, Florida*, 222 F.3d 874, 878 (11th Cir. 2000) (applying same standard to defendant's

challenge to plaintiff's standing on summary judgment). Courts rarely grant summary judgment in voting-rights cases, where "ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Johnson* v. *De Grandy*, 512 U.S. 997, 1012 (1994); *Ga. State Conference of NAACP* v. *Fayette Cty. Bd. of Com'rs*, 775 F.3d 1136, 1348 (11th Cir. 2015).

ARGUMENT

I. Plaintiffs Have Standing

Defendants' Motion rehashes arguments challenging Plaintiffs' standing that this Court and the Eleventh Circuit already considered and rejected. According to Defendants, Plaintiffs lack standing because "striking the requirement in [SB7066] will not redress their purported injury," as the "repayment requirement" Defendants allege is in Amendment 4 is "not severable from the rest of Amendment 4." (Mot. at 12.) Plaintiffs addressed these arguments in their Opposition to Defendants' Motion to Dismiss, ECF 121 at 5–9, which Plaintiffs incorporate herein.

This Court ruled Plaintiffs have standing and Plaintiffs' claims are redressable by appropriate injunctive relief. ECF 207 at 8. The Eleventh Circuit affirmed, concluding "the unconstitutional application of [SB7066's] LFO requirement is easily severable from the remainder of Amendment 4," while acknowledging "the question of severability appears to be a mixed question of law and fact under Florida law" to be determined by the trial court "on a full record . . . after a full trial on the merits"—not at the summary judgment stage. (*Jones* v. *Governor of Florida*, 19-14551, [11th Cir Feb. 19, 2020] ("Op.") at 77 & n.15.)

Defendants raise two issues that were not fully briefed at the motion to dismiss stage: (i) Defendants' reliance on the ruling from the Florida Supreme Court interpreting Amendment 4, which was issued after this Court denied Defendants' motion to dismiss but before the Eleventh Circuit affirmed the preliminary injunction; and (ii) Defendants' argument that Plaintiffs lack standing to bring claims under the National Voter Registration Act, 52 U.S.C. §§ 20501 et seq. ("NVRA").

A. The Florida Supreme Court's Interpretation of Amendment 4 Does Not Deprive Plaintiffs of Standing

Plaintiffs' standing is not precluded by the Florida Supreme Court's decision interpreting Amendment 4's phrase "all terms of sentence" as encompassing all "LFOs imposed in conjunction with an adjudication of guilty."[6] This Court expressly "assum[ed]" the Florida Supreme Court would define "all terms of sentence" to "include[] fines and restitution, fees even when unrelated to culpability, and amounts even when converted to civil liens" when it determined Plaintiffs had standing and their harm could be remedied through appropriate injunctive relief. ECF 207 at 7–8, 23, 39–40. The Eleventh Circuit affirmed, even after the Florida Supreme Court issued its advisory opinion interpreting "all terms of sentence" in Amendment 4 to include LFOs. (Op. at 75–77.) According to the Eleventh Circuit, the application of the phrase "all terms of sentence" to returning citizens unable to

[6] The Florida Supreme Court expressly declined to interpret the term "completion" in Amendment 4. *See* Advisory Op. at 4–5; *see also supra* at 2. This leaves open the possibility that severance is not required in the event this Court rules that SB7066 cannot define "completion" in a manner that violates the U.S. Constitution. *Id.*

pay their outstanding LFOs "can obviously be excised" from Amendment 4, if severability is necessary. Thus, this Court is capable of redressing Plaintiffs' claims through appropriate injunctive relief. [7]

B. *Gruver* Plaintiffs Have Standing To Assert NVRA Claims

Defendants argue some, but not all, of the individual *Gruver* Plaintiffs lack standing to bring NVRA claims set forth in Count XI of *Gruver* Plaintiffs' First Amended Complaint. (Mot. at 58–59.) This argument lacks merit for several reasons.

First, Defendants admit at least one individual *Gruver* Plaintiff—Curtis D. Bryant, Jr.—has standing to pursue NVRA claims.[8] For this reason alone, *Gruver* Plaintiffs have sufficient standing as a matter of law for this Court to rule on their NVRA claims. (Op. at 15) (citing *Vil. of Arlington Hgts.* v. *Metro. Hous. Dev. Corp.*, 429 US 252, 264 n.9 (1977) (holding that where "at least one individual plaintiff . . . has demonstrated standing . . . we need not consider whether the other . . . plaintiffs have standing to maintain the suit").)

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[7] For the same reason, *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017) does not support Defendants' standing arguments. Defendants acknowledge all Plaintiffs have standing to assert wealth-based discrimination claims and at least some Plaintiffs have standing to assert NVRA claims, but argue Plaintiffs "have not overcome the redressability hurdle" for their other claims in light of the Florida Supreme Court's advisory opinion. (Mot. at 13.) The holdings in this case—that injunctive relief can redress Plaintiffs' alleged harms and applications of LFO requirements to those unable to pay are severable from Amendment 4—resolve the redressability issues raised by Defendants not only for wealth-discrimination claims but for all of Plaintiffs' claims.

[8] Defendants do not contest Mr. Bryant's standing because he registered to vote on September 29, 2019. *See* Ex.23.

Second, Defendants do not challenge the standing of *Gruver* organizational Plaintiffs to bring NVRA claims. The record demonstrates the NVRA violations asserted in the Complaint limit the organizations' abilities to engage in their voter registration mission and force them to divert resources to address the effects of SB7066. (*Gruver, et al.* v. *Barton, et al.*, No. 19-cv-302, ECF 26 ("Am. Compl.") ¶¶31–33; Ex. 2 at 35:9-37:18; ECF 98-21 (Brigham Decl.) ¶¶6–8, 10–18; Ex. 9 at 55:6-58:14.) This harm gives organizational Plaintiffs standing to assert NVRA claims. *See Arcia* v. *Fla. Sec'y of State*, 772 F.3d 1335, 1341–42 (11th Cir. 2014); *Fla. State Conference of NAACP* v. *Browning,* 522 F.3d 1153, 1165–66 (11th Cir. 2008) (holding state NAACP chapter had organizational standing to challenge voter registration restrictions because "they will have to divert personnel and time to educating volunteers and voters on compliance with" the challenged statute). Additionally, this Court has ruled organizational plaintiffs have associational standing to assert the rights of their members for NVRA claims. *See, e.g.*, *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund* v. *Bush*, 170 F. Supp. 2d 1205, 1209–10 (N.D. Fla. 2001); *see also Am. Civil Liberties Union of Florida, Inc.* v. *Dixie County, Fla.*, 690 F.3d 1244, 1248 (11th Cir. 2012).

Third, the individual *Gruver* Plaintiffs other than Mr. Bryant also have standing, even though they were able to register before SB7066's passage. These individuals face potential injury related to Plaintiffs' claim that SB7066 affects Florida's voter list maintenance activities and "will result in registrations and removals from the rolls that is neither 'uniform [nor] nondiscriminatory,'" which Defendants fail to address. *See* Am. Compl. ¶¶228–230. The Amended Complaint

also alleges at least one Plaintiff—Latoya Moreland—appears to have been removed from the active voter registration list and may need to re-register. *Id.* ¶23; *see* Ex. 26, Email chain between Leah Aden to Counsel for the Secretary of State and Defendant Supervisor of Elections for Manatee County, March 10, 2020. Because Defendants have taken no steps to address these voter list maintenance issues, the need for all Plaintiffs to obtain relief on their NVRA claims remains pressing today, and the individual *Gruver* Plaintiffs who registered before SB7066's enactment have standing to pursue those claims. And the fact Plaintiffs are registered today does not mean they will not have to register again in the future, either as a result of a move, change in party affiliation, or removal from the rolls. Indeed, Defendants cannot argue removal from the rolls is unlikely, as Defendants have moved multiple times in multiple courts for a stay of this Court's injunction that would permit these Plaintiffs to remain registered and bar Defendants from removing these Plaintiffs from the voter rolls. Because Defendants have repeatedly sought to retain the ability to purge these Plaintiffs from the voting rolls, Defendants cannot now argue these individual Plaintiffs have no standing to bring the NVRA claims challenging the application form they will need to use if Defendants' efforts are successful.

C. *Raysor* Plaintiffs Have Standing To Assert NVRA Claims

For the same reasons noted above, *Raysor* Plaintiffs also all have standing to pursue their NVRA claims. *See supra* I.B.

Raysor Plaintiffs are not precluded from bringing their NVRA claims due to lack of notice. "The apparent purpose of the NVRA's notice provision is to allow those violating the NVRA the opportunity to attempt compliance with its mandates

before facing litigation." *Ga. State Conf. of the NAACP* v. *Kemp*, 841 F. Supp. 2d 1320 (N.D. Ga. 2012) ("*GNAACP*"); *see also Assoc. of Community Orgs. for Reform Now* v. *Miller*, 129 F.3d 833, 838 (6th Cir. 1997). *Gruver* Plaintiffs submitted a letter to Defendant Lee providing notice of several NVRA violations on behalf of themselves "and persons similarly situated." *Raysor* v. *Lee*, No. 4:19-cv-301, ECF 11-1, at 1. *Raysor* Plaintiffs are similarly situated to *Gruver* Plaintiffs, and brought claims challenging the same NVRA violations as *Gruver* Plaintiffs. *See id.* ¶¶153-158; Am. Compl. ¶¶215–230. Thus, *Gruver* Plaintiffs' notice letter sufficiently notified the Secretary of the NVRA violations alleged by *Raysor* Plaintiffs and provided her ample time to resolve them within the statutory 90-day window.

Requiring *Raysor* Plaintiffs to provide a duplicative notice letter is "unnecessary," *Miller*, 129 F.3d at 838, and would amount to requiring a "futile act," *GNAACP*, 841 F.Supp. at 1335. Providing the Secretary a second notice of the same violations serves no purpose, and the 90-day statutory period to remedy those violations has elapsed. *See* 52 U.S.C. § 20510(b). Moreover, there would be no prejudice to the Secretary if *Raysor* Plaintiffs' NVRA claims proceed alongside those brought by *Gruver* Plaintiffs; the Secretary has to respond to *Gruver* Plaintiffs' identical NVRA claims regardless of whether *Raysor* Plaintiffs provided separate notice.

Although *Miller* is not binding on this Court, its reasoning is correct and should be followed here.[9] If this Court disagrees with *Miller*, and follows the non-

[9] Defendants argue *Miller* is "highly distinguishable" because Defendants paid "substantial respect and consideration" to Plaintiffs' NVRA claims. Mot. at 56. The

binding case relied on by Defendants instead, *see* ECF 267 at 54-56 (citing *Scott* v. *Schedler*, 771 F.3d 831 (5th Cir. 2014)), the result is not to grant Defendants summary judgment against *Raysor* Plaintiffs on these claims. *Raysor* Plaintiffs provided individualized notice to the Secretary of the alleged NVRA violations on October 29, 2019. *See* Ex. 22. At the same time, *Raysor* Plaintiffs raised the issue of notice with this Court and asked for either leave to amend or an extension of time to amend to allow the statutory notice period to pass. *See Raysor* v. *Lee*, No. 4:19-cv-301, ECF 11. Therefore, if this Court agrees with Defendants, it should grant *Raysor* Plaintiffs' alternative October 29, 2019 motion to extend the deadline to file an amended complaint by 90 days and deem the amended complaint properly filed on January 27, 2020. *See* Fed. R. Civ. P. 15(b) (permitting amendments *during trial* when "doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice the party's actions or defense on the merits"); *cf. id.* 15(a)(2) (stating that "court should freely give leave [to amend complaint] when justice so requires"). Defendants provide no reason why the notice issue they raise cannot be cured by an amendment now that the 90-day notice period has elapsed.

NVRA provides a 90-day window for election officials to cure violations. The Secretary has been on notice of the alleged violations since June 29, 2019, nearly three statutory waiting periods ago. And while they participated in a work group, accepted public comment, and monitored a bill in the Legislature, Mot. at 57, Defendants have taken no *action* to cure the violations.

II. Genuine Issues of Material Fact Preclude Summary Judgment on Plaintiffs' Equal Protection Claims

Defendants argue SB7066's requirement that *all* returning citizens pay their LFOs, including those genuinely unable to pay, before being able to vote is an appropriate "legislative classification." (Mot. at 16.) It is not. Defendants ignore the weight of evidence and precedent detailing the important and distinctive nature of the right to vote.

Voting is a "fundamental political right, because [it is] preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886); *accord Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964); *Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663, 667–68 (1966). As a result, the state cannot create "voter qualifications which invidiously discriminate" or impose a "requirement[] of wealth or affluence, or payment of a fee." *Harper*, 383 U.S. at 667. Indeed, the Eleventh Circuit reaffirmed as much in upholding this Court's preliminary injunction and stating that "'the right of suffrage is a fundamental matter in a free and democratic society' and 'any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.'" (Op. at 49 (quoting *Reynolds*, 377 U.S. at 561-62).) The Eleventh Circuit also noted *Harper*'s "application of heightened scrutiny to wealth discrimination in the context of access to the franchise was based on the importance of the right in general, rather than the possession of the right by particular individuals" and thus applies with equal force to returning citizens. (Op. at 53-54.)

A. Genuine Issues of Material Fact Preclude Summary Judgment on Plaintiffs' Wealth Discrimination Claims

Defendants assert Plaintiffs' wealth-based Equal Protection claims: (i) are not subject to heightened scrutiny and (ii) cannot survive rational-basis review because the State had a rational basis in re-enfranchising only those returning citizens who had entirely paid their debt to society. (Mot. at 17-26.) The Eleventh Circuit expressly rejected these arguments, holding heightened scrutiny applies to the State's disenfranchisement scheme, Defendants fail to meet heightened scrutiny, and Defendants likely would fail to meet even rational basis review. (Op. at 39-55.) As the Eleventh Circuit stated, "[t]he long and short of it is that once a state provides an avenue to ending the punishment of disenfranchisement—as the voters of Florida plainly did—it must do so consonant with the principles of equal protection and it may not erect a wealth barrier absent a justification sufficient to overcome heightened scrutiny." (*Id*. at 55.)[10] After concluding heightened scrutiny applied, the Eleventh Circuit held it had "little difficulty in concluding that the LFO requirement is likely unconstitutional as applied to these seventeen plaintiffs." (*Id*. at 65.) Thus, there is no need to address Defendants' arguments that SB7066 would survive rational basis review.

[10] The Eleventh Circuit's decision also disposes of Defendants' argument, in the context of fundamental fairness, that SB7066 "does not 'punish[]' felons 'for non-payment' of their legal financial obligations." (Mot. at 43.) The Eleventh Circuit held that the "LFO requirement punishes those who cannot pay more harshly than those who can." (Op. at 3.)

B. SB7066 Was Enacted with Racially Discriminatory Intent

Despite Defendants' protestations, evidence developed during discovery demonstrates race-based discrimination was at least one motivating factor in the passage of SB7066. Defendants' request for summary judgment, long on rhetoric but short on facts, does not demonstrate otherwise.

Determining whether a law was motivated, at least in part, by discriminatory intent "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Young Apartments, Inc.* v. *Town of Jupiter*, 529 F.3d 1027, 1045 (11th Cir. 2008). Because "racial animus and intent to discriminate are not synonymous," proof of "ill will, enmity, or hostility are not prerequisites of intentional discrimination." *Ferrill* v. *Parker Grp., Inc*., 168 F.3d 468, 472–73 & n.7 (11th Cir. 1999). Plaintiffs need not "prove that racial discrimination was a 'dominant' or 'primary' motive, only that it was a motive." *United States* v. *Dallas Cnty*., 739 F.2d 1529, 1541 (11th Cir. 1984).

Defendants claim SB7066 was not motivated in any part by racial discrimination. To the contrary, as described below, there is ample record support detailing a racially discriminatory motive underlying passage of SB7066. Further, summary judgment is generally inappropriate in intentional discrimination cases because the "legislature's motivation is itself a factual question." *Hunt* v. *Cromartie*, 526 U.S. 541, 549 (1999).

First, SB7066 and Amendment 4 are not the same, nor are their impacts on Floridians. The impact of SB7066, unlike Amendment 4, demonstrates it was motivated by racial animus. With the passage of Amendment 4, voters chose to

restore voting rights to returning citizens and put an end to a racist policy that had a severely disproportionate impact on Black citizens. By contrast, with the passage of SB7066, legislators restored voting rights to no one and restricted the voting rights of citizens to the maximum extent they believed possible. Notably, SB7066 imposes a strict definition of when a returning citizen has "completed all terms of their sentence," with no exception for those genuinely unable to pay, whereas Amendment 4 is silent on the matter. Similarly, while SB7066 declares a sentence does not become "complete" when a court converts LFOs to a civil lien, Amendment 4 is silent on the matter. Moreover, while Florida's voters, who approved Amendment 4, have no control over the way people are sentenced, Florida's legislature does.

The recent Florida Supreme Court advisory opinion interpreting Amendment 4 does not eliminate the differences between Amendment 4 and SB7066 addressed above. The Florida Supreme Court only interpreted a *narrow* part of Amendment 4, specifically what is *included* in the phrase "all terms of sentence." The advisory opinion expressly did not address when the "terms of sentence" are considered "complete." *See* Advisory Op. at 4–5[11]

Second, Defendants agree SB7066's historical background is relevant to the discriminatory intent inquiry. However, they fail to contest Plaintiffs' evidence of historical and legislative history pointing to discriminatory intent. It is well-established SB7066 follows from a long and disturbing history of efforts to

[11] Further, the Florida Supreme Court's post-hoc interpretation of Amendment 4 does not evince Florida legislators' understanding at the time of SB7066's passage.

disenfranchise Black Floridians. Black residents in Florida were disenfranchised until 1867, and subsequently the State used a poll tax and a form of literacy test to ensure that until 1968 there were no Black elected officials in the Florida State Legislature. Ex. 12 at ¶189. One of the most pervasive forms of racism was the disenfranchisement of people convicted of felonies, which affected an estimated 21% of the Black voting-age population living in Florida. *See* 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016, The Sentencing Project (2016), https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf. Despite repeated attempts to end felony disenfranchisement (53 bills between 1998 and 2018), none were successful. *See* Ex. 12, Appendix Table 7 (summarizing each bill). Notably, of the 118 sponsors of these bills, 95 were Black legislators. *Id.*

The legislative history surrounding SB7066 is even starker. Although "smoking gun" evidence is unusual and unnecessary to support a finding of discriminatory intent, *see Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982), here there is substantial evidence the legislature knew or should have known individuals in Florida with felony convictions are disproportionally Black, Ex. 12 at ¶30, and nearly 80% of returning citizens owed LFOs and would be disenfranchised by SB7066. Ex. 11 at ¶21. Further, there is a marked racial disparity in the proportion of returning citizens who have outstanding LFOs—82.2% of Black citizens compared to 74% of white individuals. *Id.* at ¶¶23-33. Thus, a law like SB7066 that prevents voting until LFOs are paid back would disproportionally affect Black returning citizens.

The Legislature also was *explicitly* informed of the foreseeable disparate impact of SB7066 by numerous individuals and organizations.[12] There was ample debate on this subject. For example, numerous representatives such as Shevrin D. Jones emphasized "83 percent of the fines are never paid back and over 60 percent of those fines that are never paid back are from African Americans."[13] In the face of this information, the sponsors of the House and Senate legislation refused to conduct an empirical study or determine how many people would be disenfranchised based on SB7066's LFO requirement. For example, Rep. James Grant, one of the key sponsors, said he "intentionally stayed blind to the data of the affected classes," stating "I don't want to know the impact of this [bill.]"[14] Willful avoidance does not preclude a finding of knowledge, particularly when the relevant facts are a matter of "common sense." *See United States* v. *Schaffer*, 600 F.2d 1120, 1122 (5th Cir. 1979) ("[D]eliberate ignorance is the equivalent of knowledge.").

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[12] This includes the NAACP Legal Defense and Educational Fund, Inc., and the Florida State Conference of the NAACP ("FL NAACP"), who told Rep. Grant and others that SB7066 would "disproportionately impact low-income and racial minority returning citizens." Aden Letter, *see supra* p. 4.

[13] House Floor Session, H.B. 7089, April 23, 2019, https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2019041264. Accessed 28 Feb 2020, at 7:20 (remarks of Rep. Jones).

[14] H.B. 7089, Voting Rights Restoration Act – Hearing before the State Affairs Committee, Thursday Apr. 4, 2019, https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2019041080, at 3:56-3:57 (remarks of James W. Grant); b.House Floor Session, May 3, 2019, https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2019051002 at 3:59-4:02 (colloquy between Rep. Thompson and Rep. Grant).

To the extent Defendants claim the testimony of Desmond Meade, Beverlye Neal, Marsha Ellison, and Cecile Scoon (Mot. at 28-29) regarding motivations behind SB7066 support Defendants' argument, Defendants mischaracterize that testimony and misunderstand the applicable law. It is irrelevant Mr. Meade did not purportedly *know* that any legislator voted with racial animus; the issue is the objective motivations of the legislative body at issue, not a third-party's personal knowledge of any official's motivations. *See Veasey* v. *Abbott*, 830 F.3d 216, 235 (5th Cir. 2016). Moreover, proof of "ill will, enmity, or hostility are not prerequisites of intentional discrimination." *Ferrill*, 168 F.3d at 472–73 & n.7.

Nor is it relevant that the remaining individuals did not speak directly to the intentions of specific state legislators during their depositions. Instead, they testified about circumstances demonstrating the legislature acted with discriminatory motive, noting additional evidence would be provided by an expert. *See generally* Ex. 12. For example, Ms. Scoon testified that while the League of Women Voters lacked "evidence that any one person wanted racial discrimination on a personal level," the organization derived legislative intent from the passage of SB7066 in the face of state-created "impediments on black people's financial ability to pay" any fee associated with voting. Ex. 2 at 74:2-77:22; 83:7-24. Ms. Ellison stated that, before SB7066's passage, the FL NAACP alerted the legislature to the negative effects that SB7066 would have on Black returning citizens, and their concerns were ignored. Ex. 9 at 25:18-27:22; 28:12-29:15; 48:24-52:18. And Ms. Neal testified "the entire bill was discriminatory as we saw it against African Americans" and would

disproportionally affect Black returning citizens. Ex. 1 at 21:7-23:21; 25:5-17; 27:11-28:17; 52:14-55:23; 57:12-58:12; 79:14-80:23.

Also probative of discriminatory intent is the tenuousness of Defendants' justifications for passing SB7066's LFO requirements. First, as Dr. Kousser demonstrated, the legislature had ample discretion in *how* to structure SB7066 and chose to impose the draconian LFO requirements. Dr. Kousser showed the legislature's purported rationale—which he characterized as the Faithful Steward Assertion—was nothing more than a pretextual justification. Ex. 12 (Expert Report of J. Morgan Kousser, March 2, 2020) at ¶¶7, 38-86. Second, SB7066's LFO requirement was not necessary in order to offer "clarity, transparency, and accuracy for the class of people covered by Amendment 4." *Id*. at ¶211. Rep. Grant conceded there was no central repository of data elected officials or applicants could review to find out whether someone had paid all their LFOs. *Id*.; Apr. 23, 2019, House Floor Hearing at 7:04:00–7:04:07, https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2019041264.

Finally, in enacting SB7066, the Florida legislature employed procedural and substantive departures from the normal legislative sequence. SB7066 was originally a bill relating to ballot processes, but on the penultimate day of the 2019 legislative session, Senator Brandes proposed an amendment to SB7066 incorporating Amendment 4 implementation provisions that were previously included in two separate bills. Ex. 12 at ¶75. One of those bills would have allowed the conversion of LFOs to civil liens to be considered a completion of sentence that would have, in

part, mitigated the severity of the limitations on the right to vote. *Id.* at ¶21. Their eleventh-hour attachment to a must-pass measure raises the inference of impropriety. *Id.* Indeed, legislators rejected a series of proposed amendments. *Id.*

In sum, Plaintiffs have adduced evidence the legislature knew or should have known that SB7066 disproportionally affects Black citizens but enacted it anyway. At a minimum, these are disputes of material fact that defeat Defendants' Motion.

C. Genuine Issues of Material Fact Preclude Summary Judgment on Plaintiffs' Claim that SB7066 Violates Statewide Uniformity Requirements Articulated in *Bush* v. *Gore*

Defendants' argument that SB7066 does not violate the uniformity requirements laid out in *Bush* v. *Gore*, 531 U.S. 98 (2000) and its progeny has no basis in law or fact. There is no merit to Defendants' contention that *Bush* v. *Gore* has no "precedential significance" and is inapplicable to the facts of this case. (Mot. at 31-33.) Equal Protection applies not only to the allocation of the franchise, it "applies as well to the manner of its exercise." *Bush*, 531 U.S. at 104. There are more than sufficient facts in the record demonstrating both that Defendants have not provided adequate guidance on SB7066 to Supervisors of Elections to ensure uniform statewide implementation, and that individual counties are applying SB7066 differently resulting in returning citizens being able to confirm their eligibility and vote in some counties, but not in others. At minimum, Plaintiffs raise issues of material fact sufficient to defeat summary judgment.

As a threshold matter, *Bush* v. *Gore* is controlling Supreme Court precedent. *See Stewart* v. *Blackwell*, 444 F3d 843, 860 n.8 (6th Cir. 2006), *vacated on mootness grounds*, 473 F.3d 692 (6th Cir. 2007) ("Whatever else *Bush* v. *Gore* may be, it is

first and foremost a decision of the Supreme Court of the United States and we are bound to adhere to it."). Numerous courts have applied *Bush* v. *Gore*'s analysis in challenges to voting systems. *See, e.g.*, *Democratic Exec. Comm. of Fla.* v. *Lee*, 915 F.3d 1312, 1340 (11th Cir. 2019) (recognizing "'[o]ne source of [the right's] fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.' *Bush*, 531 U.S. at 104."); *League of Women Voters of Ohio* v. *Brunner*, 548 F.3d 463, 476 (6th Cir. 2008); *Black* v. *McGuffage*, 209 F. Supp. 2d 889, 898–99 (N.D. Ill. 2002).

Further, the Equal Protection principles identified by the Supreme Court in *Bush* v. *Gore* were not novel. They reaffirmed "long-revered principles" that "States, after granting the right to vote on equal terms, 'may not, by later arbitrary and disparate treatment, value one person's vote over that of another.'" *Stewart*, 444 F.3d at 859 (quoting *Bush*, 531 U.S. at 104–05). Indeed, the right to vote is "fundamental [in] nature and the vigilance in its defense . . . stem[s] from the recognition that our democratic structure and the preservation of other rights depends to a great extent on the franchise." *Id*. at 862. Additionally, Equal Protection applies not only to the allocation of the franchise, it "applies as well to the manner of its exercise." *Bush*, 531 U.S. at 104. It requires certain "minimum procedures necessary to protect the fundamental right of each voter." *Id*. at 109.

SB7066 violates the Equal Protection principles laid out in *Bush* v. *Gore* by failing to create uniform statewide procedures for how returning citizens determine their eligibility to vote and register to vote, resulting in inconsistent application for similarly situated individuals. Secretary of State Lee is Florida's chief elections

officer. *See* Fla. Stat. § 97.012. Therefore, she is required to "[o]btain and maintain uniformity in the interpretation and implementation of the election laws" and "[p]rovide uniform standards for the proper and equitable implementation of the registration laws." *Id*. But the Secretary of State has not provided *any* guidance to county election officials about how they should: (i) identify a returning citizen's outstanding LFOs, (ii) determine what constitutes disqualifying LFOs, (iii) determine the outstanding balance on disqualifying LFOs, or (iv) implement a process for confirming voters' eligibility or the basis for removing them from the rolls. SB7066 itself also provides no guidance to county election officials. As a consequence, each county applies different standards and procedures for determining whether Plaintiffs and other returning citizens are eligible to register and vote. *Compare* Ex. 3 at 84:18-85:13 (Craig Latimer, Supervisor of Elections for Hillsborough County, stating he is expecting guidance on this issue from the Secretary of State) *with* Ex. 8 at 200:14-201:7 (Mark Earley, Supervisor of Elections for Leon County: "What should they do? Get a good lawyer.") *and* Ex. 5 at 85:9-24 (Kim Barton, Supervisor of Elections for Alachua County, testifying she directed one returning citizen unsure of her obligations to the Florida Rights Restoration Coalition). The end result is that returning citizens with the *same* LFOs, but residing in different counties, may receive entirely *different* outcomes, with some being able to register and vote, and others not. This is the gravamen of an equal protection violation under *Bush* v. *Gore* and its progeny.

Defendants respond that SB7066 "imposes a standard that applies uniformly" and it is "mere speculation" whether "some counties *might* apply different standards

for determining" whether a returning citizen has repaid their LFOs. (Mot. at 33.) This is demonstrably false, and does not meet Defendants' burden on summary judgment. First, the record demonstrates the Secretary of State has *not* provided *any* guidance to local election officials, let alone a uniform standard. *See* Ex. 5 at 45:25-46:8; Ex. 3 at 84:18-85:1, 85:12-13; Ex. 10 at 104:20-24. Second, it is more than "mere speculation" that different counties apply SB7066 differently. Numerous Florida election officials have testified about this concern. *See* Ex. 5 at 126:4-18; Ex. 10 at 104:25-105:6.

Florida's non-uniform application of SB7066 is evident in county removal processes that differ from county to county. The Secretary of State is responsible for notifying the appropriate Supervisor of Elections if a registered voter has been convicted of a felony and has not had their rights restored. *See* Fla. Stat. §98.075(5). Counties appear to treat that notification differently, depending in large part on their available resources. *See* Ex. 8 at 128:12-129:14. For example, Leon County conducts its own independent research to verify that voters identified by the Secretary are eligible before initiating cancellation of registration (*id.* at 42:13-44:20, 128:12-129:14), while Hillsborough County initiates the cancellation process for registered voters in reliance on the information provided by the Secretary of State. Ex. 3 at 60:7-65:19.

The Secretary's inability to provide Supervisors with credible and reliable evidence of returning citizens' eligibility leads to non-uniformity in counties' maintenance of the voter rolls. This is analogous to the circumstances in *Stewart* v. *Blackwell,* where the Sixth Circuit held plaintiffs appropriately alleged an Equal

Protection challenge due to the use of disparate voting technologies in different counties. The effect was "a greater likelihood that one's vote will not be counted on the same terms as the vote of someone in a [different] county." 444 F.3d at 871. It is no different here, where the lack of uniform procedures will lead to certain returning citizens being allowed to remain registered and vote while others similarly situated are removed from the rolls—the exact "arbitrary and disparate treatment" precluded by *Bush* v. *Gore*. 531 U.S. at 104. In addition, to the extent Defendants argue it is not feasible or expedient to provide more uniform guidance to the counties, this argument cannot defeat Plaintiffs' equal protection claim. "A desire for speed is not a general excuse for ignoring equal protection guarantees." *Bush*, 531 U.S. at 108; s*ee also Fla. Democratic Party* v. *Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, *7 (N.D. Fla. Oct. 16, 2016) (administrative inconvenience "cannot justify stripping Florida voters of their fundamental right to vote and to have their votes counted").

Finally, there is nothing in *Lemons* v. *Bradbury*, 538 F.3d 1098 (9th Cir. 2008) requiring a different result. (Mot. at 32-33.) The court in *Lemons* determined there was no Equal Protection violation where the Secretary of State "uniformly instruct[ed] county elections officials" how to verify referendum signatures. *Lemons*, 538 F.3d at 1106. Here the Secretary of State has *not* provided uniform instructions, or *any* instructions, to county elections officials.

III. Genuine Issues of Material Fact Preclude Summary Judgment on Plaintiffs' Twenty-Fourth Amendment Claims

Defendants argue: (i) the Twenty-Fourth Amendment does not apply to any returning citizens because they have no voting rights to infringe, and (ii) court costs and fees are not "other taxes" for the purpose of the Twenty-Fourth Amendment. Both arguments fail.

A. The Twenty-Fourth Amendment Applies to Returning Citizens

Defendants argue the State is "not condition[ing] the 'right to vote' on payment of costs or fees; it [is] condition[ing] the '*restoration* of a felon's right to vote' on satisfaction of all debts owned by virtue of a criminal sentence." (Mot. at 35.) This narrow reading of the Twenty-Fourth Amendment has no support in its text, legislative history, or precedent. The Twenty-Fourth Amendment's reach is expansive—it categorically prohibits taxes as a condition of the franchise and "abolished absolutely" any tax "as a prerequisite to voting." *Harman* v. *Forssenius*, 380 U.S. 528, 542 (1965); *see also Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966) ("To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."). This interpretation is confirmed by statements at the time of its enactment. For example, Rep. Gallagher noted that "[a]ny charge for voting unjustly discriminates against people of limited means. And whatever the amount of money, a citizen of the United States should not have to pay for his constitutional right to vote." Ex. 20. at 17667. Rep. Halpern stated the Twenty-Fourth Amendment's breadth is not limited to monetary obligations explicitly labeled taxes and "is broad enough to prevent the defeat of its objectives by some ruse or manipulation of terms." *Id*. at 17669.

Indeed, this Court already held that the Twenty-Fourth Amendment applies to returning citizens. In its October 18, 2019 Order this Court rejected this *exact* argument from Defendants. ECF 207 at 40 ("The State says the amendment does not apply to felons because they have no right to vote at all, but that makes no sense."). Just as the Eleventh Circuit held it violates the Fourteenth Amendment's proscription on unequal treatment to restore the right to vote to the wealthy while denying it to those less fortunate, it violates the Twenty-Fourth Amendment to restore voting rights to those who have paid their taxes while denying it to those who have not.

Defendants' non-binding, out-of-circuit authority does not require a different result. (Mot. at 35-36.) The three-sentence analysis on this claim in *Harvey* v. *Brewer* did not examine the Twenty-Fourth Amendment's text or cite any case law—let alone reckon with *Harman* and *Harper*. 605 F.3d 1067, 1080 (9th Cir. 2010); *cf. Harman*, 380 U.S. at 542; *Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663 (1966). Likewise, the unpublished *Howard* v. *Gilmore* decision contained scant analysis on this issue. *See* No. 99-2285, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000). And *Johnson* v. *Bredesen* reflexively relied on *Harvey* and *Howard* without conducting any of its own textual or historical analysis. *See* 624 F.3d 742, 750 (6th Cir. 2010); *cf. also id.* at 766–76 (Moore, J., dissenting) (conducting textual and historical analysis of Twenty-Fourth Amendment).[15] Relatedly, *none* of these

[15] The same abbreviated analysis was conducted in the two additional non-binding cases Defendants cite to for support. *See Coronado* v. *Napolitano*, No. 07-1089, 2008 WL 191987 (D. Ariz. Jan. 22, 2008); *Thompson* v. *Alabama*, 293 F. Supp. 3d 1313, 1332–33 (M.D. Ala. 2017).

cases discussed the import of the Amendment's "any other tax" language, except for the dissent in *Bredesen*, which concluded requiring returning citizens to pay certain LFOs as a condition of restoring their voting rights constituted a prohibited "other tax." *See Bredesen*, 624 F.3d at 775 (Moore, J., dissenting).

The end result, as Congress intended, is that the Twenty-Fourth Amendment's proscription on conditioning voting on the payment of any "fee" or "charge" applies with equal force to returning citizens.[16] Thus, any fees citizens, or returning citizens, have to pay to access the franchise are disallowed.

B. LFOs Qualify as "Taxes" Under the Twenty-Fourth Amendment

Because LFOs qualify as "[a]ny other tax" under the Twenty-Fourth Amendment, it is "repugnant" to require their payment as a condition of voting. ECF 207 at 41. Defendants' arguments to the contrary ignore factual evidence in the record and rely on disputed facts. At minimum, the record creates issues of material fact precluding summary judgment.

Generally, courts use a functional approach to determine what constitutes a tax. *See, e.g.*, *Nat'l Fed'n of Indep. Bus*. v. *Sebelius*, 567 U.S. 519, 646–66 (2012).

[16] The Supreme Court has repeatedly struck down other measures conditioning voting or other forms of political participation upon the payment of a fee. *See, e.g.*, *Hill* v. *Stone*, 421 U.S. 289, 300 (1975) (invalidating Texas law that "disfranchise[d] persons otherwise qualified to vote, solely because they ha[d] not rendered some property for taxation"); *Cipriano* v. *Houma*, 395 U.S. 701, 702 (1969) (holding unconstitutional Louisiana law permitting only "property taxpayers" to vote in certain elections); *Lubin* v. *Panish*, 415 U.S. 709 (1974) (invalidating statute requiring indigent persons to pay candidate filing fees). And despite Defendants' mischaracterization of *Harman* (Mot. at 36), it still stands for the proposition that "no equivalent or milder substitute may be imposed" in place of a poll tax. 380 U.S. at 542.

The "standard definition of a tax" is "an enforced contribution to provide support for the government." *United States* v. *State Tax Comm'n of Miss.*, 421 U.S. 599, 606 (1975) (citation omitted). And "the essential feature of any tax" is that "[i]t produces at least some revenue for the Government." *Sebelius*, 567 U.S. at 646. In *Sebelius*, the Court considered at length whether the Affordable Care Act's individual mandate was functionally a tax or a penalty because the Court concluded that Congress did not have the authority under the Commerce Clause to impose the mandate as a penalty (*i.e.*, as punishment). The Court held that it was functionally a tax, and thus was permissible under Congress's broad taxing authority. *Id.* at 574.

This analysis—determining whether a financial obligation functions as a tax or punishment—is relevant to acts of *Congress* because, unlike states, Congress does not have police powers. Instead, its powers to punish are circumscribed by the Commerce Clause. For that reason, the Supreme Court has acknowledged the question of whether a financial obligation functions as a tax or as punishment" may be immaterial" . . . [w]here the sovereign enacting the law has power to impose both tax and penalty." *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 38 (1922).

Florida, like Congress, has the power to tax; but it also has the plenary police power to punish. Therefore, that criminal fines may function as punishment does not mean that they cannot also function as taxes.[17] They can function as both, and

[17] The Court indicated its preliminary view that restitution and fines cannot be "other taxes" because "the primary purpose is to punish the offender." ECF 207 at 42. Per *Bailey*, however, this does not preclude a finding that restitution and fines are functionally taxes, because the State has the authority both "to impose both penalty and tax." 259 U.S. at 38.

to the extent they do, the Twenty-Fourth Amendment precludes Florida from conditioning the right to vote upon satisfaction of those obligations, even if those obligations function in part to serve the State's power to punish.

In addition to any punitive intent, SB7066's LFO provisions are *designed* to produce revenue for the Florida Government. As this Court recognized, "Florida has chosen to pay for its criminal-justice system in significant measure through such fees." ECF 207 at 42; ECF 98-1 at 27–32, 46–47; *see also Crist* v. *Ervin*, 56 So.3d 745, 752 (Fla. 2010). But, in addition to fees and costs, Florida generates revenue for its criminal justice system through the imposition of fines and restitution. *See e.g.*, Fla. Stat. § 775.083(1) (directing criminal fines to be paid into fine and forfeiture fund); § 142.01 (establishing "fine and forfeiture fund for use by the clerk of the circuit court in performing court-related functions" funded through criminal fines and penalties, among other court costs and fees); §§ 775.089(1)(a)(2), 960.17 (establishing circumstances creating an obligation of restitution to the state, to be paid into Crimes Compensation Trust Fund, including when a person is found civilly liable to a victim); § 960.21 (establishing Crimes Compensation Trust Fund, funded by moneys "recovered on behalf of the [Department of Legal Affairs] by subrogation or other action, *recovered through restitution*," or received from fines, fees, or other sources, "for the purpose of providing for the payment of all necessary and proper expenses incurred by the *operation of the department* and the payment of claims" including "administrative costs" and "service charge provided for in chapter 215") (emphasis added); § 215.20 (imposing an eight percent service charge "representing the estimated pro rata share of the cost of general government" that is "appropriated

from all income of a revenue nature deposited in all trust funds . . . including interest or benefit received from the investment of the principal of such trust funds" to be deposited in General Revenue Fund); *see also* Ex. 24.

Furthermore, many mandatory fees and costs lack any punitive purpose at all, as they are imposed on criminal defendants regardless of whether adjudication is withheld, or the person is ultimately acquitted or convicted. *See, e.g.*, Fla. Stat. § 938.27(1) (imposing costs of prosecution on criminal defendants even where adjudication is withheld); Fla. Stat. §§ 27.51(1)(b), 27.52(b) (requiring any criminal defendant seeking appointment of a public defender to pay an application fee of $50 without regard to whether the person is ultimately acquitted, with the fee due seven days after application is submitted); *see also* Ex. 21 (Appendix summarizing characteristics of all court costs imposed upon conviction of a felony under Chapter 938, and examples of court costs imposed under Chapters 27, 775, and 939 of the Florida Statutes, including those imposed irrespective of guilt); Ex. 24 (indicating whether each individual fine, fee, court cost, and service charge collected and remitted by county clerks is mandatory or discretionary). *Cf.* Mot. at 39 (claiming without evidence fees only apply "against those who are adjudicated guilty of a felony" and "individuals are not made to pay a fee if they are acquitted of the crime for which they are charged"). Because the various LFOs imposed under Florida law are used to generate revenue for the State, they are functionally taxes.

Defendants do not dispute LFOs' role in funding Florida's government—they admit SB7066 is an attempt to generate revenue. *See* ECF 132 at 31; ECF 163 at 11–12. Notably, though, LFOs fund more than just the court system. As discussed

in the OPPAGA Report, under Florida statute, clerks of the court *must* distribute "the cumulative excess of all fines, fees, service charges, and costs retained by the clerks of the court" to the Florida Department of Revenue for distribution. *See* Ex. 14 at 4. This excess becomes part of the General Revenue Fund and is used to fund other areas of state government, including those having nothing to do with criminal justice. For the fiscal year 2017-2018, clerks of the court collected $746.16 million from LFOs, with over $113 million in funds provided to the General Revenue Fund. *Id.* at 11. As a result of Florida's decision to structure its government finances this way, LFOs assume an outsized importance as revenue generators for the entire state.

Defendants' arguments that SB7066's LFO requirement does not violate the Twenty-Fourth Amendment because Plaintiffs "'themselves incurred' [LFOs] by virtue of their felonies," and "Plaintiffs would owe these [LFOs] regardless of whether they ever sought to vote" (Mot. at 38), are inapposite and unsupported by the evidence.[18] As a threshold matter, many fees are imposed on criminal defendants

[18] Defendants suggest Plaintiffs concede "the only fees that could prevent re-enfranchisement are those assessed as part of a criminal sentence." (Mot. at 38.) This is false. Plaintiffs have consistently argued that returning citizens are likely to be denied re-enfranchisement under SB7066 based on fees and costs that fall outside those identified in sentencing documents, in part because no State official can tell them which LFOs are actually disqualifying. *See, e.g.*, ECF 177-1 at 5-6. Plaintiffs have never conceded that fees constitute "part of the sentence." To the extent Defendants purport to rely on *Raysor* Plaintiffs' First Amendment Complaint for this proposition, that pleading is no longer operative, having been superseded by *Raysor* Plaintiffs' Second Amended Complaint, ECF 12, *Raysor* v. *Lee*, 4:19-cv-301-RH (filed Oct. 29, 2019). *Dresdner Bank AG* v. *M/V Olympia Voyager*, 463 F.3d 1210, 1215 (11th Cir. 2006) ("An amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary.").

irrespective of guilt. Nor are fines and fees only imposed upon plaintiffs following a conviction; many cases are resolved following *nolo contendere* pleas that do not contain representations of culpability. *Id.* Additionally, that Plaintiffs would owe LFOs even if they never sought to vote does not somehow allow the State to *prevent* Plaintiffs from voting based on them.

It is also irrelevant that collection of LFOs is handed by the clerk of court or that amounts are set by statute. (Mot. at 39–40.) As addressed above, the test for whether something is a tax is a "functional one," and the clerks collect LFOs largely to generate revenue for the State. And, as Defendants are no doubt aware, all taxes are set by statute, and often keyed to the service used by the taxpayer. *See generally* Fla. Stat. Title XIV. Similarly, whether or not a tax also has a regulatory effect does not affect whether it is or is not a tax. *See Sonzinsky* v. *U.S.*, 300 U.S. 506, 555-56 (1937) ("Every tax is in some measure regulatory.").

Finally, the record shows that the act of paying LFOs—including fines and restitution—often requires returning citizens to pay taxes and surcharges that fund the State. *See, e.g.*, Ex. 13 at 9-10, 13, 61-62. Thus, Plaintiffs and those similarly situated are required to pay additional taxes to the State simply to satisfy their LFO requirements, and are precluded from paying only the amount that disqualifies them under either SB7066 or the advisory definition of Amendment 4. *Id.* This unrebutted evidence is sufficient to preclude Defendants' Motion, as it raises genuine issues of material fact whether Amendment 4 and SB7066 impose an "other tax" on voting.

IV. Genuine Issues of Material Fact Preclude Summary Judgment on Plaintiffs' Due Process Claim

Floridians with past felony convictions have a right to due process in determining whether they are eligible to vote under SB7066. ECF 207 at 44. The determination of what process is due rests on the balance between (1) the interest affected; (2) the risk of erroneous deprivation under the current procedure and the "probable value, if any, of additional or substitute procedural safeguards;" and (3) the State's interest, including the "fiscal and administrative burdens" additional procedures would entail. *Matthews* v. *Eldridge*, 424 U.S. 319, 335 (1976). The procedures must be "tailored, in light of the decision to be heard, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case." *Id.* at 349.

Based on the preliminary record, this Court concluded Plaintiffs' claim that SB7066's LFO requirement violates due process "carries considerable force," because the records necessary to determine whether Plaintiffs and those similarly situated are eligible to vote under SB7066 "are decentralized, often accessible only with great difficulty, sometimes inconsistent, and sometimes missing altogether." ECF 207 at 43-44. The Court also concluded, because voters cannot register without affirming that they are eligible to vote, "some genuinely eligible voters may choose to forgo voting rather than risk prosecution." *Id.* at 44. Nonetheless, the Court declined to enjoin Defendants from enforcing SB7066's LFO requirement on procedural due process grounds because Plaintiffs were entitled to preliminary relief on their wealth-discrimination claims. *Id.* at 48. The Court thus reserved the

question "whether the state can constitutionally refuse to restore the right to vote based on a financial obligation that the state cannot confirm or calculate." *Id.* at 45.

Defendants do not dispute Plaintiffs and those similarly situated are entitled to due process in determining their eligibility to vote under SB7066. (Mot. at 41-42.) Nor do Defendants address the due process claims of *Gruver* organizational Plaintiffs, who encounter many members and individuals they serve who cannot determine whether or in what amount they owe LFOs. Instead, Defendants argue existing procedures are sufficient as a matter of law, given "the work that the Department of State has conducted (and is continuing to conduct)." (*Id.*) Defendants' mere say-so that "work" has been done to resolve the due process concerns identified by this Court cannot provide the basis for summary judgment. *See Fitzpatrick* v. *City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir. 1993) (noting a movant who does not bear burden at trial must show "an absence of evidence to support the non-moving party's case" or provide "affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial"). Yet Defendants do not attempt to rebut the evidence put forward at the preliminary injunction stage. They offer no evidence the Department of State materially changed anything for voters related to these procedures since last October, nor do they explain what "work" they have conducted. Much less do they explain how this work addresses the "substantial administrative and constitutional issues" identified by this Court. ECF 207 at 48. These concerns are heightened by evidence obtained since the preliminary injunction hearing that at minimum establishes genuine disputes of material fact whether the Department has provided *any* process (much less a

constitutionally sufficient one) for citizens to determine their eligibility without risking criminal sanction.

A. The Risk of Erroneous Deprivation Is High Because the State Cannot Provide Reliable Information to Voters

There continues to be a substantial risk eligible voters will be deprived of the right to register and vote because "the State of Florida cannot provide reliable or consistent information about what LFOs returning citizens may owe when they are otherwise eligible to register to vote and vote." Ex. 13 (Expert Report of Traci Burch dated March 2, 2020) at 6. There are no reliable, publicly available sources for determining whether individuals have outstanding LFOs, whether they have paid their LFOs, or whether their LFOs are disqualifying. *See id.*; *see also* Pl.'s PI Reply Br., ECF 177-1 at 5–10. Rather, most of the publicly available documents provide conflicting information with respect to the assessment and payment status of LFOs. *Id.* Dr. Burch found substantial discrepancies in the records of 98% of individuals whose cases she researched, depending on which source she looked at, including discrepancies as to the original amount of LFOs assessed in relation to a particular case. *Id.* at 4, 40. She found that county clerks were often unable to determine whether an outstanding balance represented only the amount assessed at sentencing or also included amounts accruing afterwards. *Id.* at 10. She identified cases where the clerk's online database showed that LFOs had been paid in full, but the clerk's office stated there was an outstanding balance, and vice versa. *See id.* at 51–52. Because the information available to them is unreliable, confusing, and often conflicting, there is a significant risk that eligible voters will be deterred from

registering and voting either based on records erroneously indicating they have disqualifying LFOs, or because they are simply unable to determine their eligibility.

Furthermore, no one at Department of State, the Supervisors of Elections, nor the County Clerks is able to help voters determine whether they are eligible. The Supervisors lack the information necessary to do so, and the information available to the Department of State and the Clerks through the Comprehensive Case Information System ("CCIS") is no more reliable than what is available to the voter. The Financial Summary Information screenshot from CCIS is "one piece of the documentation that may or may not support a credible and reliable match" in addition to sentencing documents and other court records. Ex. 7 at 248:12–18. The CCIS system does not reliably track restitution however, *see id.* at 246:24–248:7, and information regarding other LFOs may not be available, or may not be consistent with what is in court records. Ex. 15 ("Dec. 30 Memo") at 3 (indicating that where this is the case, the record should be tagged as "NMNSO[19] – Financial Obligations Undetermined."). Cases for which financial obligations are undetermined "will be revisited later for further research," but there is no indication what that research will entail. *Id.* Because these records are so unreliable, the Department has been unable to identify any standard for what constitutes "credible and reliable" information an active voter is ineligible due to outstanding LFOs. *See generally*, *id*. (referring to

[19] NMNSO stands for "Not Murder, Not Felony Sexual Offense." The Department only conducts an LFO investigation with respect to felony match files where it has already been determined the individual is no longer in prison or under supervision and was not convicted of murder or a felony sexual offense. Dec. 30 Memo, Ex. 15 at 3.

the credible and reliable determination as a "case by case" process); *see also* Ex. 7 at 316:4-11.

As such, the Department of State will not tell citizens whether they are eligible to vote, whether they have completed their sentence, what LFOs are disqualifying, whether a voter is eligible to vote if her sentence has been modified such that outstanding LFOs are no longer considered part of the sentence, or whether an individual who is genuinely unable to pay is eligible to vote. Ex. 7 at 240:2–15; 264:20–265:3, 270:8–13, 286:19–25. If individuals call the Department of State inquiring about eligibility, they are directed to the County Clerks or the Department of Corrections. *Id.* at 265:20–25, 270:8–13. Staff at the County Clerks offices are often unavailable or unresponsive, and when they can be reached, they "lack[] the expertise and capacity to help returning citizens determine their LFOs and which ones were disqualifying for voting purposes." Ex. 13 at 10–11. Supervisors do not have the information necessary to determine whether someone has paid their LFOs, and thus may direct inquiries to other agencies, only to have those agencies bounce the person back to them. Ex. 16 at 48; Ex. 10 at 106:2–107:4, 109:12–111:7, 124:23–126:6. They rely on guidance from the Department, but the Department has not provided any guidance on how Supervisors should determine whether someone has outstanding LFOs, or what instructions should be given with respect to rights restoration. Ex. 7 at 236:23–237:3, 265:5–9, 330:13–23, 333:10–24; Ex. 10 at 81:25–83:11; Ex. 3 at 88:14–15, 89:24–90:05. Thus, unless a voter is able to obtain legal counsel, there is no one to assist voters in determining their own eligibility. Ex. 7 at 179:23–189:4; Ex. 10 at 85:23–86:2, 101:5–11; Ex. 8 at 200:20–201:7.

The State also has not taken any of the steps it has identified that might help to resolve this "administrative nightmare." Prelim. Inj. Hr'g Tr., ECF 205 at 293:8. When asked whether the Work Group's recommendations about consolidating relevant data had been fulfilled, the Secretary's 30(b)(6) representative testified "No. Definitely not fulfilled . . . ." Ex. 7 at 309:7. She likewise testified that other Work Group recommendations had not been completed. *See id.* at 310:4–10 (testifying that no voting rights liaison had been appointed); *id.*at 312:13-313:14 (testifying that Secretary's office has "not yet shared information with the Supervisors of Elections regarding the uniform instructions that should be issued regarding restoring voting rights"); *id.* at 315:4–316:22 (testifying that she was unaware of when Secretary's office would fulfill Work Group recommendation of working with FCOR to identify sources of information about restitution and responding "no" to whether recommendation would be fulfilled by the March or November 2020 elections).

Finally, there is a substantial risk that eligible voters with out-of-state and federal convictions incurred outside of Florida will be denied the right to vote even though they have had their rights restored in the state in which they were convicted. The Department of State directs its reviewers to a site called ProCon to determine whether a Florida resident who was convicted of a crime in another state has had their right to vote restored. Ex. 15 at 4 ("Work Out of State (OOS) FED cases by using the state of conviction guideline for voting rights restoration as notated in ProCon: https://felonvoting.procon.org/view.resource.php?_resourceID=000286"). Several of the ProCon notations regarding out-of-state re-enfranchisement laws are inaccurate and certain to lead to the disenfranchisement of eligible voters who have

had their rights restored in the state of their conviction.[20] The Department's reliance on a third-party internet source to investigate Florida citizens' right to vote creates an unreasonably high risk of erroneous deprivation.

The lack of reliable information available to eligible voters creates a substantial risk they will erroneously be deprived of their right to vote. At the very least, the evidence establishes a dispute of material fact precluding Defendants' summary judgment motion.

B. Voters Cannot Obtain a Determination of Eligibility Without Risking Criminal Prosecution

The only existing procedure for determining a voter's eligibility is the process for removing active voters from the voter registration rolls. *See* Fla. Stat. §§ 98.075(5), (7); Matthews Decl. ¶ 9-11, ECF 132-1 at 136-37; Ex. 10 at 22:3-12; 47:10-15; Ex. 7 at 238:18-20. Thus, in order to obtain a determination of eligibility, an individual must register to vote, and as a result subject himself to potential criminal prosecution if he is ineligible. *Both* the pre- and post-SB7066 state voter registration forms require voters to check a box stating that if they have been

[20] ProCon.org does not assert or intend to be a comprehensive, up-to-date library of state felony disenfranchisement laws, but rather provides context for policy conversations. (*See* ProCon.org, "About Us," https://www.procon.org/about-us.php). For example, the description of Alabama's policies states, "Some people convicted of a felony may apply to have their vote restored immediately upon completion of their full sentence. Those convicted of certain felony offenses such as murder, rape, incest, sexual crime against children, and treason are not eligible for re-enfranchisement." ProCon.org, "State Felon Voting Laws," https://felonvoting.procon.org/state-felon-voting-laws/). In reality, many people with convictions in Alabama never lose their right to vote to begin with, only those convicted of certain enumerated felonies do. Ala. Code § 17-3-30.1(c).

convicted of a felony, their rights have been restored. *See* ECF 152-33, ECF 152-24. Both also require voters to sign an oath stating they are "qualified to register as an elector under the Constitution and the laws of the State of Florida," Fla. Stat. § 97.051, and all of the information contained in the application is true, *id*. § 97.052(2)(q). Finally, although there is a *mens rea* requirement for criminal liability for false swearing or submission of false registration information under Fla. Stat. § 104.011, the voter registration forms omit the intent requirement and state that submitting false affirmation is punishable by a felony. *See* ECF 152-33, ECF 152-34. Thus, the ordinary voter who is unsure of his own eligibility is likely to be deterred from registering due to the apparent threat of criminal liability.

Furthermore, even a voter who is aware of the intent requirement is likely to be deterred. The record shows the Department of State refers voters for potential criminal prosecution under Fla. Stat. § 97.012 regardless of any evidence of intent. When an elections complaint is filed, the Department does not consider evidence of intent, or even whether intent is an element of the alleged crime, before referring for prosecution. Ex. 7 at 291:24-18; *see also* Ex. 17.[21] A voter could be referred for

[21] In 2019 the Secretary referred an unsigned complaint to a state attorney alleging violations of Fla. Stat § 104.011 (false registration) and § 104.15 (unqualified elector willfully voting), without any determination of intent. *See* Ex. 17. The only intent evidence underlying the deferred prosecution agreement was the affirmation signed by the voter when she registered and voted. *See* Ex. 18. The voter testified she had registered at the wrong address inadvertently at the DMV, because of a policy allowing city employees to use the City Hall address on their driver's licenses. *Id.* The deferred prosecution agreement contains a statement by the voter stating the registration error "was a mistake and oversight on my part, although not done

investigation and prosecution for false swearing or voting on the basis of outstanding LFOs even absent any evidence of willfulness. Nor is a finding or admission of intent necessary for an individual to be subject to substantial financial penalties related to a criminal prosecution.[22] As this Court has noted, "determining whether a felon's assertion was made in good faith will not always be easy," and voters cannot count on election officials or state's attorneys to be charitable. ECF 207 at 44. Voters unsure of their eligibility have every reason to be deterred from registering.

C. The State's Existing Process Does Not Sufficiently Protect Against Either the Risk of Erroneous Deprivation or the Risk of Criminal Prosecution

The State's existing process is insufficient for two additional reasons. First, the State is not using that process to determine voters' eligibility with respect to LFOs and is therefore not providing any voter with notice of their potential ineligibility or an opportunity to be heard. As a result, there is a substantial risk that tens of thousands of currently registered voters could be subject to criminal prosecution for false registration or unqualified voting because they will not be provided with notice of their ineligibility, nor an opportunity to be heard with respect

willfully or intentionally" and "when the personal error was brought to my attention I immediately corrected the unintentional mistake." *Id.* at 4.

[22] Although prosecution was deferred in the Shang case, and there was no finding or admission of guilt, the voter was subject to twelve months of pretrial supervision and ordered to pay nearly $6,000 in costs of supervision, prosecution, and investigation. *Id.* at 1-2.

to the same.[23] This problem affects voters who are eligible under SB7066 because they have paid their LFOs but for whom there are conflicting records of such payments, voters who are eligible under SB7066 despite having outstanding LFOs because their LFOs are not disqualifying or their sentence has been modified, voters who are eligible despite their outstanding LFOs because they genuinely cannot pay, and voters who are ineligible under SB7066 because they have disqualifying LFOs but who believe they are eligible because they have not yet been determined to be ineligible and provided with notice of the same by the State.

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[23] This risk is not hypothetical. There are several recent examples of states and private entities targeting registered voters for harassment, criminal investigation, and prosecution based on allegations of fraud, regardless of any evidence of intent. For example, in 2019 the Texas Secretary of State referred 95,000 individuals to the Texas Attorney General's office for potential registration and voter fraud, without any evidence of willfulness. *See* ECF 8-1 at 11, *Texas LULAC* v. *Whitley*, No. 5:19-cv-000074-FB (W.D. Tex, Feb. 4 2019). The list was primarily made up of naturalized citizens who were eligible to vote, but had been swept up into a flawed purge based on outdated records. Order, ECF 61, *Texas LULAC* v. *Whitley*, No, 5:19-cv-00074-FB (W.D. Tex. Feb. 27, 2019); *cf. United States* v. *Florida*, 870 F. Supp. 2d 1346 (N.D. Fla. 2012). In 2018, the Public Interest Legal Foundation, which filed an amicus brief at the Eleventh Circuit in this case, settled a 2018 lawsuit after falsely accusing up to 5,000 Virginia voters of "committing multiple separate felonies, from illegally registering to vote to casting an ineligible ballot," based on voter registration data it obtained from counties. *LULAC-Richmond* v. *Public Interest Legal Foundation*, No. 1:18-cv-00423 at 1, (E.D. Va. Aug. 13, 2018). PILF failed to "conduct[] even a cursory investigation" of whether the voters were in fact non-citizens (they were not), *id.* at 12, much less whether there was any intentional violation of law. Finally, in Texas Crystal Mason has been prosecuted, convicted, and sentenced to five years in prison for voting while ineligible, where the only evidence of intent offered by the State is that she signed an affirmation on a provisional ballot stating she was eligible to vote. The provisional ballot was not counted, and Ms. Mason, who was still on federal supervision when she cast the ballot, maintains she did not realize she might be ineligible under Texas law.

The Department of State has identified "upwards of 65,000 or more" active voter registration records that match records of individuals with past felony convictions, who are not currently in prison or under supervision, and were not convicted of either murder or a felony sexual offense. Ex. 7 at 262:15-263:10, 335:10-24. Although the Department has reviewed these matches and flagged active voters who may be ineligible due to outstanding LFOs, the Department is not "comfortable" that the current process for identifying individuals with outstanding LFOs is "credible and reliable." *Id.* at 283:16-284:4. Thus, the Department has not sent any of these records to the counties. *Id.* at 231:20-232:11. And, while the Department is working "to determine and finalize a process and develop a comfort level regarding these types of cases without sending anything down," *id*. at 259:9-13, there is no plan to do so before the March 17 primary election or the November general election. *Id.* at 271:24-272:19, 336:6-18, 336:20-22.[24]

Second, even if the State begins using its existing procedures to remove voters on the basis of outstanding LFOs, the unreliability of the process and the failure by the Secretary to provide uniform guidance to Supervisors renders the process completely arbitrary. Supervisors lack the information necessary to conduct an independent investigation into a voter's eligibility, and to make any determination about eligibility. Ex. 10 at 126:21-128:5, 129:23-130:4; *see also* Pl.'s PI Br. ECF

[24] To the extent the Department has a plan or a timeline for getting comfortable sending these records down to the supervisors, department officials assert the information is alternatively privileged, in flux, subject to future legislation, or subject to the outcome of this litigation. *Id.*; *see also id.* at 243:5-7, 246:6-9, 261:19-24, 266:2-247:3.

177-1 at 5-8. Yet, the Department of State's position is Supervisors have total discretion to adopt whatever procedures they like for determining eligibility, without respect for whether those procedures are uniform from case-to-case within the county, or whether there is any uniformity between counties. *See* Ex. 7 at 287:7-24. *Cf. Bush* v. *Gore*, 531 U.S. 98, 104–05 (2000) ("[H]aving once granted the right to vote on equal terms, the State may not by later arbitrary and disparate treatment value one person's vote over that of another."). *See also supra* Part II.C.

The State's failure to create a process by which citizens may determine whether they are eligible to vote without risking criminal prosecution violates due process. Furthermore, the State's failure to adopt and enforce standards for determining voter eligibility under its existing procedure creates a substantial risk that rights restoration will be conducted in an arbitrary and non-uniform manner both within counties and from county-to county.

D. Genuine Issues of Material Fact Preclude Summary Judgment on Plaintiffs' Void for Vagueness Claim

This Court made a preliminary determination that SB7066 was not unconstitutionally vague because any vagueness with respect to the factual matter of an individual's eligibility "can be addressed in the hearing that the State makes available." ECF 207 at 50. Defendants suggest that "nothing has changed that would counsel revisiting this determination" (Mot. at 42), but the fact that nothing has changed is precisely *why* the Court must revisit its decision.

The void-for-vagueness doctrine applies even where the language of a statute is not itself ambiguous, but requires citizens to guess how the law will apply to

indiscernible facts. *See Giaccio* v. *State of Pa.*, 382 U.S. 399, 402 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits[.]"); *Watkins* v. *U.S.*, 354 U.S. 178, 209–15 (1957) (invalidating conviction because application of the law necessitated reference to sources of factual information that "leave the matter in grave doubt"); *Int'l Harvester Co. of Am.* v. *Commonwealth of Ky.*, 234 U.S. 216, 221 (1914) (invalidating conviction based on Kentucky courts' construction of several statutes together because the construction provided a standard premised on an unknowable fact: "the market value . . . under normal market conditions"); *see also* Anthony G. Amsterdam, Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U. Case 4:19-cv-00300-RH-MJF Document 98-1 Filed 08/02/19 Page 77 of 88 78 Pa. L. Rev. 67, 68 n.4 (1960) (noting that in *Watkins* "vagueness was imported into a statute relatively definite on its face by a chain of affairs in the several-year history of a legislative investigatory committee").

Here, State and local officials continue to be incapable of determining whether an individual with outstanding LFOs is eligible to vote. *See supra* Part II.B. The Department of State has refused to take any action to resolve this confusion, to adopt standards for determining eligibility, or to identify which LFOs are disqualifying and which are not. *Id.*; *see also* Ex. 7 at 240 (Q: "Does the Secretary of State's Office have a position as to which specific LFOs are disqualifying for voters in Florida?" A: "Not at this time."). When the Secretary's 30(b)(6) witness was asked at her deposition *when* the Secretary intended to announce a position as to which

LFOs are disqualifying, the Secretary's attorney objected that the question invaded attorney-client privilege and instructed the witness not to answer. *Id.* Crucial information necessary for an individual voter to determine if she is eligible to vote or could be subject to criminal sanction for voting cannot be privileged.

Indeed, the Department of State has yet to make a single credible and reliable eligibility determination related to LFOs. Fla. Stat. § 98.075(5) (requiring the Department to send any credible and reliable information regarding ineligibility to the Supervisors); Ex. 7 at 234:22-235:13 (stating the Department has not sent any files down to the Supervisors on the basis of LFOs). The legislature has similarly sat on its hands. *See* Lawrence Mower, *Amend. 4 won't get fixed in Florida. Here's why.*, Tampa Bay Times (Feb. 5, 2020) (https://www.tampabay.com/florida-politics/buzz/2020/02/05/florida-felons-still-cant-vote-as-2020-election-looms-heres-why/) (stating "two GOP lawmakers confirmed to the *Times/Herald* this week that they won't follow a federal judge's recommendation last fall that they revisit how they implemented a 2018 ballot measure" because they were waiting for the Supreme Court to weigh in). As such, tens of thousands of Florida citizens are at risk for criminal prosecution. *See supra* Part IV.B.

The State's refusal to say what SB7066's LFO provision requires or how to determine whether those requirements have been met renders the provision void for vagueness. *See United States* v. *Dumas*, 94 F.3d 286, 291 n.3 (7th Cir. 1996) ("[T]he validity of a law with which it is impossible to comply may be questioned."); *United States* v. *Evans*, 883 F.3d 1154, 1162 (9th Cir. 2018) (holding a condition of supervision unconstitutionally vague where the government "offered no suggestion

as to what [the challenged term] might mean"). Absent such guidance from the State, the LFO provision bears all the hallmarks of unconstitutional vagueness: it chills voting, a protected First Amendment activity; it is enforced with criminal penalties; and it gives rise to a risk arbitrary and discriminatory enforcement. *See* Pls' PI Reply Br., ECF 177-1 at 14-16. Thus, whether the State is incapable of doing so, or simply refuses to, its failure to explain the scope of SB7066's LFO provision renders the provision unconstitutionally vague. At the very least, the record evidence demonstrates a dispute of material facts precluding summary judgment.

V. Genuine Issues of Material Fact Preclude Summary Judgment on Plaintiffs' *Anderson-Burdick* Claim

Defendants argue "a statute is only subject to *Anderson-Burdick* balancing if it affects the right to vote," and Amendment 4 applies only to rights *restoration*, not the right to vote itself. (Mot. at 45–46.)

As the Eleventh Circuit emphasized, regardless of how Defendants seek to characterize SB7066, this case involves Plaintiffs' "access to the ballot box," (*see, e.g.*, Op. at 3, 21) and the specific scheme Plaintiffs challenge is one that "disenfranchise[s] these seventeen plaintiffs solely on account of their indigency and inability to pay for reasons wholly beyond their control." *Id.* at 50–51. This Court determined, and the Eleventh Circuit affirmed, Plaintiffs are eligible to vote if they are qualified but for LFOs they are genuinely unable to pay. *Id.* at 53; (Op. at 29). Yet Defendants, in the nearly five months since this Court issued its injunction, have provided no mechanism for eligible returning citizens to determine their eligibility to vote or show their inability to pay. The failure of the State to provide a process

for showing inability to pay or determining eligibility, along with the State's failure to provide reliable information to voters necessary to determine eligibility without voters risking criminal prosecution, *see supra*, Section IV.B, burdens the voters whose voting rights have been restored consistent with this Court's and the Eleventh Circuit's interpretation of the Equal Protection Clause.

The factual record supports Plaintiffs' *Anderson-Burdick* claims—and, at the very least, presents disputed issues of fact precluding summary judgment in favor of Defendants. For example, Dr. Smith identified more than 774,000 otherwise qualified individuals who would be disenfranchised solely on the basis of SB7066's LFO requirements. Ex. 11 (Second Supplemental Expert Report of Daniel A. Smith March 2, 2020) at ¶22. Courts have consistently held laws disenfranchising thousands of otherwise eligible voters impose unconstitutional burdens on the right to vote. *See, e.g.*, *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) ("[E]ven one disenfranchised voter—let alone several thousand—is too many."); *Democratic Executive Comm. of Florida* v. *Lee*, 915 F.3d 1312 (11th Cir. 2019) (upholding decision on *Anderson-Burdick* grounds to enjoin Florida's rejection of approximately 4,000 vote-by-mail ballots for signature non-match). Plaintiffs who are unable to pay their outstanding LFOs hold a right to vote to which *Anderson-Burdick* applies.

Further, even assuming that returning citizens with outstanding LFOs do not have a right to vote—an assumption Plaintiffs do not concede, and one the Eleventh Circuit rejected—the State's inability to provide appropriate information about what LFOs individuals owe nevertheless will disenfranchise large numbers of eligible

voters, including members of the organizational Plaintiffs, thus violating *Anderson-Burdick*. The factual record is replete with evidence demonstrating Florida's system is an "administrative nightmare" whereby individuals cannot determine what they owe or get guidance on how to determine that. *See, e.g.*, ECF 177-1 at 16–18; Tyson Decl., ECF 98-13 ¶¶4–17; Miller Decl., ECF 98-12 ¶¶4–7, 13; Riddle Decl., ECF 98-6 ¶16; Prelim. Inj. Hr'g Tr., ECF 204 at 162:8-165:18 (testimony of Betty Riddle); *id.* at 172:14-75:23 (testimony of Clifford Tyson). Evidence presented from Plaintiffs' experts further demonstrates the difficulty, expense, and burden required to investigate the status of a returning citizen's LFOs, often leading to dead-ends where the State acknowledges it is impossible to determine whether or not the returning citizen has outstanding LFOs that are disqualifying under SB7066. *See* Ex. 11 at ¶¶10-12; Ex. 13 at 7-9. Accordingly, eligible voters who owe nothing—including members of the organizational Plaintiffs—will be chilled from registering or voting because they cannot determine their eligibility with certainty. This harm independently triggers an *Anderson-Burdick* analysis, which SB7066 fails for all the reasons stated in Plaintiffs prior briefing. *See* ECF 98-1 at 57–63; ECF 177-1 at 16–18.

Defendants have had an opportunity since this Court entered its preliminary injunction to remedy SB7066's shortcomings, but they have failed to do so. Defendants have not put in place any system for those who are eligible to vote to register without fear of prosecution, or for returning citizens to make a showing of inability to pay their outstanding LFOs. As a result, the State continues to unconstitutionally burden the voting rights of individual plaintiffs (who are unable

to pay) *as well as* returning citizens who are unable to determine their LFO and thus may be chilled from participating in the franchise.

VI. Genuine Issues of Material Fact Preclude Summary Judgment on *McCoy* Plaintiffs' Claim Based on Their Status as Low-Income Women of Color under the Fourteenth and Nineteenth Amendments

McCoy Plaintiffs further allege that the intersection of their race, class, and gender creates a unique circumstance in which they are triply impacted by the imposition of a monetary fee as a prerequisite to restoring their right to vote. Their claim is grounded both in the Fourteenth Amendment's equal protection clause and in the Nineteenth Amendment's prohibition against any law that denies or abridges their right to vote based on gender or sex. *See McCoy* Amended Compl., ¶¶82, 93-108. The proper test the Court should apply to their equal protection claim is the undue burden standard articulated in *Anderson-Burdick*, not the stringent litmus-paper test Defendants maintain is applicable in this case.

Moreover, a plain reading of the Nineteenth Amendment's legislative history counsels that the undue burden test is the applicable standard for purposes of analyzing their gender-based claim as well. At trial, *McCoy* Plaintiffs will prove that: (1) statistically, women of color earn less money than their male and white female counterparts; (2) that economic disparity is heightened when women of color have a criminal conviction; and (3) consequently, as low-income women of color who have struggled to find gainful employment, they are more negatively impacted by the enforcement of SB7066's LFO requirement. Therefore, Defendants' assertion that *McCoy* Plaintiffs must prove discriminatory intent on the basis of

gender is incorrect and summary judgment against *McCoy* Plaintiffs is improper given the Court has not made any factual findings as to these claims.

A. The *Anderson-Burdick* Undue Burden Test Applies to *McCoy* Plaintiffs' Gender-Based Equal Protection Claim

Plaintiffs will present evidence at trial establishing that SB7066's LFO requirement will have a disparate, negative impact on racial minorities and those who lack a genuine financial inability to satisfy their monetary obligations as a condition to their voter eligibility. However, *McCoy* Plaintiffs will also show through expert testimony that formerly incarcerated Black women have an unemployment rate of 43.6% as compared to the unemployment rates for formerly incarcerated Black men (35.2%), white women (23.2%), and white men (18.4%).[25] Moreover, 33% of formerly incarcerated Black women who find employment obtain only part-time or occasional jobs, whereas 14% of formerly incarcerated white men are working part-time or occasional jobs.[26] 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."[27] Thus, low-income women of color

[25] Lucius Couloute & Daniel Kopf, Prison Policy Initiative, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, at fig. 2 (2018) [hereinafter Couloute & Kopf, *Out of Work*] (emphasis in original), https://www.prisonpolicy.org/reports/outofwork.html.
[26] *Id*. at tbl. 3.
[27] Wendy Sawyer, Prison Policy Initiative, *The Gender Divide: Tracking Women's State Prison Growth* (2018) [hereinafter Sawyer, *The Gender Divide*], https://www.prisonpolicy.org/reports/women_overtime.html.

are multiply-burdened by a law that conditions the right to vote on the payment of any fee.

McCoy Plaintiffs alleged these disparities in a manner that recognizes the layers of marginalization low-income women of color face. The fundamental legal question, however, remains the same: whether SB7066 places an undue burden on the Plaintiffs' right to vote because of their mixed status as low-income Black women. As the Court in *Anderson* held, the appropriate determination in constitutional challenges to a State's election laws is "whether the challenged restriction unfairly or unnecessarily burdens 'the availability of political opportunity.'" 460 U.S. at 793. *See also Democratic Exec. Comm. of Fla*. v. *Lee*, 915 F.3d at 1319 ("Plaintiffs need not demonstrate discriminatory intent behind the [challenged election scheme] because we are considering the constitutionality of a generalized burden on the fundamental right to vote, for which we apply the *Anderson-Burdick* balancing test instead of a traditional equal-protection inquiry.").

Notably, the *Anderson* Court placed significant weight on the voices of those traditionally left out of the "political mainstream" and the limitation on their political voices through restrictive election laws. 460 U.S. at 1572-73. By analogy, *McCoy* Plaintiffs as individuals represent three distinct groups that have suffered from laws and government policies that mute their political voices and restrain their participation in the political sphere. Defendants' argument that because *McCoy* Plaintiffs have inserted the issue of gender into the discourse pertaining to the harmful effects of SB7066 renders the *Anderson-Burdick* legal framework inapplicable to their equal protection claim demonstrates Defendants' failure to

grasp the significance and multi-layered burden of the Black woman's intersectional experience in society.[28] This claim asks the Court to be especially suspect of a law—SB7066—imposing an undue burden on the right to vote through multiple forms of discrimination.[29]

B. The *Anderson-Burdick* Undue Burden Test Is the Applicable Standard for Resolving *McCoy* Plaintiffs' Nineteenth Amendment Claim

Defendants' only argument why they are entitled to summary judgment on *McCoy* Plaintiffs' Nineteenth Amendment claim is that Plaintiffs do not allege SB7066 was enacted with the specific purpose of harming female voters. (Mot. at 45.) For the reasons articulated below and in Section VI.A above, Plaintiffs only must show that SB7066 imposes an undue burden on their fundamental right to vote, not that the law was enacted for a discriminatory purpose.

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 for and were

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[28] Although *McCoy* Plaintiffs maintain the *Anderson-Burdick* sliding scale analysis applies to their Fourteenth Amendment claim, if the Court adopts the traditional approach, *Craig* v. *Boren* dictates that gender-based claims are entitled to intermediate scrutiny. 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

[29] *See* Rosalyn Teborg-Penn, *African American Women in the Struggle For the Vote*, 1850-1920, p. 1-2 (1998)("For black women, however, the struggle to maintain the vote continued for two generations after the passage of the women suffrage amendment, as most were robbed of their ballots by the success of white political supremacy in the South.").

registered to vote in Maryland. 258 U.S. 130 (1922). The plaintiff, Oscar Leser, sought to have them 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.

The second case is *Breedlove* v. *Suttles*, 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*. 302 U.S. 277 (1937), *overruled by Harper*, 383 U.S. at 669. 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. *Id.* 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. Given Justice Butler's antiquated viewpoint, *Breedlove* is wholly unhelpful for purposes of guiding any court in how Congress intended the amendment to be enforced.

However, as some scholars have persuasively argued, the Nineteenth Amendment necessarily must be read in the context of the evolving, expansive

protection of voting rights and women's rights under the Fourteenth Amendment which incorporates the *Anderson-Burdick* sliding scale, undue burden analysis.[30]

Plaintiffs already have elaborated upon why the undue burden test is applicable to their equal protection claims in the context of voting rights. *See Democratic Exec. Comm. of Fla.*, 915 F.3d at 1340. However, *McCoy* Plaintiffs also point to a line of reproductive rights cases in which the Supreme Court explicitly adopted the *Anderson-Burdick* framework for purposes of again *rejecting* a litmus-paper test when addressing the impact of facially gender-neutral state regulations on women. *See Planned Parenthood of Southeastern Penn.* v. *Casey*, 505 U.S. 833 (1992) (recognizing a more flexible legal standard is necessary when determining the extent to which a law impacts a woman's right to freedom and liberty); *see also Planned Parenthood of Southeast, PA* v. *Strange*, 9 F. Supp. 3d 1272, 1283 (M.D. Ala. 2014) ("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."); *Whole Woman's Health* v. *Hellerstedt*, 136 S.Ct. 2292, 2318 (2016) (ruling that Texas restriction on abortion providers "constitutes an 'undue burden' on their

[30] *See* Reva Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 Yale L.JF. 450, 482-484 (2020) ("Given our current constitutional convictions about the distribution of the franchise, we might retrospectively enlarge the community of Americans we count among the Fourteenth Amendment's ratifiers.") (citing Justice Ginsburg's majority opinion in *United States* v. *Virginia*, 518 U.S. 515 (1996) as one that "invite[s] synthetic interpretation" of the Nineteenth Amendment).

constitutional right"). *McCoy* Plaintiffs' claim is thus strengthened by the combined mandates of the Nineteenth and Fourteenth Amendments.

A holistic reading of the Nineteenth Amendment requires consideration of the historical context in which it was enacted and the expanding protections to voting rights that courts have applied over the decades. SB7066 not only harms *McCoy* Plaintiffs because they are of color and because they are of lower economic status. Plaintiffs have at the very least presented genuine issues of material fact as to the impact of SB7066 on them as women in combination with their race and class and should be given an opportunity to present the evidence in support of this claim.

VII. SB7066 Violates Plaintiffs' First Amendment Rights

Defendants assert only that the First Amendment provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment, and that SB7066 does not "impede [organizational Plaintiffs'] ability to recruit voters or associate with like-minded individuals." (Mot. at 47.)

Notably, Defendants do not dispute organizational Plaintiffs' First Amendment interests, which are well-supported by applicable precedent. *See, e.g.*, *League of Women Voters of Florida* v. *Cobb*, 447 F. Supp. 2d 1314, 1334 (S.D. Fla. 2006). Instead, Defendants argue that organizational Plaintiffs' First Amendment claims fail if Plaintiffs' Equal Protection and due process claims fail. (Mot. at 47.) For all the reasons set forth in this brief, *see supra* at 14-38, Defendants' request for summary judgment on Plaintiffs' Equal Protection and due process claims should be rejected, and so Defendants' request for summary judgment as to Plaintiffs' First Amendment claims should be rejected for the same reasons.

Additionally, organizational Plaintiffs have independent First Amendment interests that are not derivative of individual Plaintiffs' voting rights. For example, organizational Plaintiffs are harmed by the difficulties they face, and resources they must devote, to assess the eligibility of and register people who are ultimately eligible under SB7066. *See Cobb*, 447 F.Supp. at 1334; *see also Fla. State Conference of NAACP* v. *Browning*, 522 F.3d 1153, 1165–66 (11th Cir. 2008). The record demonstrates as much. Patricia Brigham, the President of the League of Women Voters of Florida testified "SB7066 significantly impedes LWVF's ability to engage in voter registration activities." ECF 98-21. In addition, Cecile Scoon stated in her deposition that SB7066 "made our job [registering voters] a lot harder because members were afraid of encouraging somebody who might have had a felony conviction" from registering. Ex. 2 at 35:23-36:2.

Further, Defendants' argument that SB7066 somehow *increases* voter participation is ludicrous. (Mot. at 47.) The record is undisputed that hundreds of thousands of returning citizens have outstanding LFOs, and many of them are genuinely unable to pay. Ex. 11 at 21. It is solely due to the draconian language and effect of SB7066 that these returning citizens will be unable to vote and the organizational Plaintiffs' ability to identify, recruit, and register voters will be impeded. This situation is similar to *League of Women Voters of Fla.* v. *Browning*, where this Court held a statute regulating a voter-registration drive implicated "core First Amendment activity." 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012). SB7066 and the uncertainty surrounding it have severely affected organizational Plaintiffs' ability and efforts to register voters. Plaintiffs thus have supported their well-pled

First Amendment claims with evidence in the record, and Defendants' request for summary judgment should be denied.

VIII. Genuine Issues of Material Fact Preclude Summary Judgment on *Gruver* Plaintiffs' *Ex Post Facto* Claim and *McCoy* Plaintiffs' Excessive Fines Claim

Defendants fail to demonstrate the absence of material disputed facts on both *Gruver* Plaintiffs' *Ex Post Facto* claim and *McCoy* Plaintiffs' Excessive Fines claim. Defendants now reverse their prior position that SB7066 constitutes punishment, which they argued on appeal in this case. Additionally, Defendants fundamentally misstate the nature of *McCoy* Plaintiffs' Eighth Amendment claim, which is a claim under the Excessive Fines Clause, not the Cruel and Unusual Punishments Clause. Defendants' Motion should be denied on both claims.

First, the Eleventh Circuit explicitly held in affirming this Court's preliminary injunction the LFO requirement of SB7066 constitutes continuing punishment, and those who are unable to pay their LFOs "are punished more harshly than those who committed precisely the same crime—by having their right to vote taken from them likely for their entire lives." (Op. at 29.) The panel held this continuing "punishment is linked not to their culpability, but rather to the exogenous fact of their wealth. Indeed, the wealthy identical felon, *with identical culpability*, has his punishment cease. But the felon with no reasoned prospect of being able to pay has his punishment continue solely due to the impossibility of meeting the State's requirement, despite any bona fide efforts to do so." (*Id.* at 29-30 (emphasis in original).)

Defendants offer no facts supporting their assertion the legislative intent of SB7066 was not to inflict punishment on people who are unable to pay legal LFOs (Mot. at 47),[31] and instead state conclusively that "[b]ecause there is no discernable intent that [SB]7066 was supposed to be punitive, the Plaintiffs' *Ex Post Facto* and Eighth Amendment claims [fail] if they cannot show that its operation is so punitive that it negates the Florida Legislature's intent." (*Id.* at 50.) Summary judgment is improper precisely because there is a material factual dispute about the legislative intent of SB7066.

Article 1, Section 10, of the U.S. Constitution provides that "[n]o state shall . . . pass any . . . ex post facto law" retroactively punishing or extending sanctions imposed on any citizen. As alluded to by Defendants, the ex post facto analysis first asks whether the legislature intended to pass a punitive statute; if it did not, the inquiry shifts to whether the law's punitive effects override the government's civil intent. *Smith* v. *Doe*, 538 U.S. 84, 92 (2003). At trial, *Gruver* Plaintiffs will prove, as alleged in their Complaint and contrary to Defendants' conclusory assertions, the punitive purpose of LFOs was discussed explicitly in the legislative debate over SB7066. *Gruver* Compl. ¶204 ("For example, House sponsor Representative James Grant referred to 'fines, fees, [and] court costs' as 'punishment for a crime.'"). Even if the Court finds no legislative intent to punish people with felony convictions when

[31] Defendants argue elsewhere in their Motion whether the intent of SB7066 was to discriminate on the basis of race, (*see* Mot. at 28-29), but nowhere present any facts about whether the intent of SB7066 was to inflict punishment. Even if they had, this would remain an issue of disputed material fact that is not properly resolved at the summary judgment stage.

SB7066 was passed, *Gruver* Plaintiffs will present evidence the law's punitive effects outweigh its civil intent.

Moreover, Defendants' argument that SB7066 cannot be characterized as punishment is disingenuous. As noted by the Eleventh Circuit, Defendants themselves argued SB7066 furthers the State's punitive interests by continuing to punish people with felony convictions who have outstanding LFOs by withholding their right to vote. *See id.* at 25–27. Defendants cannot argue SB7066 supports the State's interest in punishment when it helps their case and abandon the argument when it harms them. Defendants fail not only to prove the absence of disputed material facts on this claim, but also to carry the argument that SB7066 does not constitute punishment.

Second, Defendants misstate *McCoy* Plaintiffs' Eighth Amendment Claim as one alleging a violation of the Eighth Amendment's prohibition of cruel and unusual punishment. (Mot. at 9, 47–48.) As clearly stated in their First Amended Complaint, *McCoy* Plaintiffs allege that SB7066 violates the Eighth Amendment's prohibition on excessive fines.[32] *McCoy* Am. Compl. ¶¶122-26 ("Count Six: Violation of the Eighth Amendment (Prohibition on excessive fines)"). Because Defendants fundamentally misunderstand *McCoy* Plaintiffs' Eighth Amendment claim, they also fail to present the Court with *any* facts relating to *McCoy* Plaintiffs' Excessive Fines claim let alone demonstrate the absence of material facts in dispute.

[32] *McCoy* Plaintiffs' original Complaint included an Eighth Amendment claim under the Cruel and Unusual Punishments Clause, which was omitted in their First Amended Complaint, *see* Complaint, *McCoy* v. *DeSantis*, 4:19-cv-00304, at ¶¶98-101 (N.D. Fla. July 1, 2019).

Claims brought under the Excessive Fines Clause of the Eighth Amendment have typically come in the context of civil forfeiture, *see, e.g.*, *United States* v. *Sperrazza*, 804 F.3d 1113, 1127 (11th Cir. 2015), but the principles of an excessive fines claim apply broadly, where the Eighth Amendment "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *United States* v. *Bajakajian*, 524 U.S. 321, 328 (1998). As acknowledged recently by the U.S. Supreme Court, "the protection against excessive fines guards against abuses of government's punitive or criminal-law enforcement authority" and "has been a constant shield throughout Anglo-American history[.]" *Timbs* v. *Indiana*, 139 S. Ct. 682, 686, 689 (2019) (incorporating the Excessive Fines Clause as applicable to the states). Fines may be excessive where they are utilized "in a measure out of accord with the penal goals of retribution and deterrence," particularly where state and local governments across the country rely heavily on fines and fees as a source of revenue. *Id.* at 689 (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 979, n.9 (1991) (opinion of Scalia, J.)).

At trial, *McCoy* Plaintiffs will demonstrate SB7066 violates the Eighth Amendment's prohibition on excessive fines by conditioning the right to vote on payment of LFOs both unrelated and disproportionate to a person's culpability. Even assuming a criminal defendant's underlying LFOs were related and proportional to their culpability when originally imposed, a law conditioning that person's fundamental right to vote on payment of LFOs—regardless of the amount—bears no relationship to their criminal culpability. Specifically, *McCoy* Plaintiffs will show that under SB7066, as of March 4, 2020, Plaintiff Sheila

Singleton is ineligible to vote unless and until she can pay off her outstanding LFOs totaling $16,384.13, including $1,028.20 in fees, $12,110.81 in restitution, and $3,245.12 in accrued interest (which continues to accrue); and Plaintiff Rosemary McCoy is ineligible to vote unless and until she can pay off her outstanding LFOs totaling $7,806.72, including $6,400 in restitution and $1406.72 in accrued interest (which continues to accrue). *See* Ex. 19 at 1.

Imposing such a punishment—withholding the right to vote until payment is made on outstanding LFOs—constitutes an excessive fine because, as recognized by the Eleventh Circuit, it constitutes new or continued punishment not tied to a person's culpability, but instead to their wealth. (Op. at 29–30, 45–48, 64–65); *see Harmelin*, 501 U.S. at 978 n.9 ("There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit."). Tying payment of these amounts to Plaintiffs McCoy's and Singleton's ability to vote bears no relation to the underlying crimes for which they were convicted, and preventing them—and those like them—from voting until they pay off these sums is not a proper or proportional exercise of the State's power to extract payment as punishment.

Because Defendants have failed to move for summary judgment on *McCoy* Plaintiffs' Eighth Amendment excessive fines claim as pled in their First Amended

Complaint and failed to demonstrate the absence of material facts in dispute on that claim, their motion must be denied.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request Defendants' Motion be denied.

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PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: _/s/ *Pietro Signoracci*_____

Pietro Signoracci*
David Giller*
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue Of The
Americas, New York, NY
10006
Tel.: (212) 373-3000
Fax: (212) 757-3990
psignoracci@paulweiss.com
dgiller@paulweiss.com

Leah C. Aden*
John S. Cusick*
NAACP Legal Defense and
Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
laden@naacpldf.org
jcusick@naacpldf.org

Jimmy Midyette
Fla. Bar No. 0495859
American Civil Liberties Union
Foundation of Florida
118 W. Adams Street, Suite 510
Jacksonville, FL 32202
Tel: 904-353-8097
jmidyette@aclufl.org

Wendy Weiser
Myrna Perez
Sean Morales-Doyle*
Eliza Sweren-Becker*
Brennan Center for Justice at NYU School of Law
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8310
wendy.weiser@nyu.edu
myrna.perez@nyu.edu
sean.morales-doyle@nyu.edu
eliza.sweren-becker@nyu.edu

Julie A. Ebenstein
Fla. Bar No. 91033
R. Orion Danjuma*
Jonathan S. Topaz*
Dale E. Ho**
American Civil Liberties Union Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 284-7332
Fax: (212) 549-2654
jebenstein@aclu.org
odanjuma@aclu.org
jtopaz@aclu.org
dho@aclu.org

Daniel Tilley
Fla. Bar No. 102882
Anton Marino
Fla. Bar. No. 1021406
American Civil Liberties Union of Florida
4343 West Flagler St., Suite 400
Miami, FL 33134
Tel: (786) 363-2714
dtilley@aclufl.org
amarino@aclufl.org

Counsel for Gruver Plaintiffs

/s/ Michael A. Steinberg
Michael A. Steinberg
Fla. Bar No. 340065
4925 Independence Pkwy, Suite 195
Tampa, FL 33634
Tel: (813) 221-1300
frosty28@aol.com

Counsel for Plaintiffs Kelvin Leon Jones & Luis A. Mendez

s/ *Nancy G. Abudu*
Nancy G. Abudu (Fla. Bar No. 111881)
Caren E. Short*
Southern Poverty Law Center
P.O. Box 1287
Decatur, Ga 30031-1287
Tel: 404-521-6700
Fax: 404-221-5857
nancy.abudu@Splcenter.org
caren.short@Splcenter.org

Counsel for Plaintiffs Rosemary Osborne McCoy & Sheila Singleton

/s/ *Danielle M. Lang*
Daniel M. Lang*
Mark P. Gaber*
Molly E. Danahy*
Jonathan M. Diaz*
Blair Bowie*
Campaign Legal Center
1101 14th Street, Ste. 400
Washington, DC 20005
(202) 736-2200
dlang@campaignlegal.org
mgaber@campaignlegal.org
mdanahy@campaignlegal.org
jdiaz@campaignlegal.org
bbowie@campaignlegal.org

Chad W. Dunn (Fla. Bar No. 119137)
Brazil & Dunn
1200 Brickell Ave, Ste. 1950
Miami, FL 33131
(305) 783-2190
chad@brazilanddunn.com

Counsel for Raysor Plaintiffs

* Admitted *Pro Hac Vice*
** *Pro Hac Vice* applications forthcoming

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the size, font, and formatting requirements of Local Rule 5.1(C), and that this brief complies with the word limit requested in Plaintiffs' unopposed pending motion to file an opposition to Defendants' summary judgment memorandum in excess of the word limit. Specifically, this brief contains 17,702 words, excluding the case style, signature block, and certificates.

/s/ *Pietro Signoracci*_____

Counsel for Gruver Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 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.

/s/ *Pietro Signoracci*

Counsel for Gruver Plaintiffs