No. 19-14551

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Kelvin Leon Jones, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

BRIEF OF APPELLEES MCCOY AND SINGLETON

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATEDISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1-1, the Southern Poverty Law Center states that it has no parent corporations, nor has it issued shares or debt securities to the public. The organization is not a subsidiary or affiliate of any publicly owned corporation, and no publicly held corporation holds ten percent of its stock. Rosemary McCoy and Sheila Singleton state that they are natural persons and, therefore, have no parent corporations, nor have they issued shares or debt securities to the public.

I hereby certify that the disclosure of interested parties submitted by Defendant-Appellant Governor of Florida and Defendant-Appellant Secretary of State of Florida is complete and correct except for the following corrected or additional interested persons or entities:

1. Bryant, Curtis – *Plaintiff/Appellee*
2. Defend, Educate, Empower – *not an organization in this action*
3. Jones, Kelvin Leon – *Plaintiff/Appellee*
4. Miller, Jermaine – *Plaintiff/Appellee*
5. Oats, Anthrone – *Witness*
6. Paul Smith – *Attorney for Plaintiffs/Appellees*
7. Paul Weiss Rifkind Wharton & Garrison LLP – *Attorneys for Plaintiffs/Appellees*

8. Pérez, Myrna – *Attorney for Plaintiffs/Appellees*

9. Nelson, Janai S. - *Attorney for* Gruver *Plaintiffs/Appellees*

10. Spital, Samuel - *Attorney for* Gruver *Plaintiffs/Appellees*.

/s/ *Nancy G. Abudu*
Counsel for McCoy *Appellees*

STATEMENT REGARDING ORAL ARGUMENT

This Court already has scheduled oral argument to take place on January 28, 2020. The *McCoy* Appellees agree that oral argument would assist the Court in deciding the questions Defendants-Appellants raise on appeal.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Pursuant to Fed. R. App. P. 28(i) and Eleventh Circuit Rule 28-1(f), the *McCoy* Appellees adopt and incorporate by reference the following portions of the *Gruver* and *Raysor* Appellees' briefs:

1. Statement of the Issues

2. Statement of the Case

3. Standard of Review

4. Their legal arguments, although the *McCoy* Appellees offer additional bases upon which to uphold the district court's preliminary injunction order.

JURISDICTIONAL STATEMENT

McCoy Appellees[1] agree with Defendants-Appellants' jurisdictional statement as it applies to Secretary of State Laurel. For the reasons stated in the *McCoy* Appellees' Response to Jurisdictional Question, they take no position on the Governor's standing to appeal and agree with the *Gruver* and *Raysor* Appellees that this Court does not have jurisdiction over Plaintiffs-Appellees' Twenty-Fourth Amendment claim.

[1] This appeal involves five cases and four Plaintiff groups challenging SB-7066 consolidated below under *Jones v. DeSantis*, No. 19-cv-300 (N.D. Fla). This brief is submitted on behalf of Appellees Rosemary McCoy and Sheila Singleton, the individual Plaintiffs in *McCoy v. DeSantis*, No. 19-cv-304 (N.D. Fla). For brevity, this brief will refer to these individual Plaintiffs as the "*McCoy* Appellees".

INTRODUCTION

At the heart of this case are individuals who represent the over 10% of Floridians who, prior to the historic passage of the Voting Restoration Amendment (hereinafter "Amendment 4") were permanently denied the right to vote because of a felony conviction. With deliberate speed, the Florida legislature and the Governor swept through Senate Bill 7066, a law that requires all disenfranchised citizens, regardless of their financial status, to pay all legal financial obligations associated with their criminal sentence (hereinafter "LFOs"). With the stroke of a pen, eighty percent of the estimated 1.4–1.6 million people that Amendment 4 re-enfranchised became ineligible voters again. *See* Smith Report, ¶¶ 8, 61, Doc. No. 98-3.

The straightforward legal question before this Court in this interlocutory appeal is whether the imposition of a monetary requirement as a condition to vote against people who genuinely cannot afford to pay the debt violates the Fourteenth Amendment's Equal Protection Clause. The answer to that question, based on groundbreaking cases from the Supreme Court, is resoundingly yes. The more challenging question before this Court and our judicial system is whether a person's wealth should forever dictate their current life condition and future. Social science already has clearly established that poor and low-income people fare the worst in almost all indicators of success such as incarceration rates, educational attainment, economic status, and access to affordable housing. While some differ as to whether

these indicators implicate human rights, civil rights, or fundamental rights, there is no question they help determine whether a person can form the foundation for a stable, successful life. That is really what Appellees Rosemary McCoy and Sheila Singleton are asking for in this lawsuit—the protection of the right to vote and a real opportunity through the political process to improve their own life condition.

Contrary to the assertions of Defendant-Appellant Governor DeSantis and Defendant-Appellant Secretary of State Lee (collectively, "Defendants-Appellants"), SB 7066 is not a bill of interpretation, clarification, or adherence to the will of the people. It is one in a long string of examples of Florida's outright hostility towards voting rights, especially when it comes to people with felony convictions. Defendants-Appellants contend the Plaintiffs have no fundamental right to vote because they have been disenfranchised. Their logic is that because the LFO requirement equally applies to anyone with a felony conviction, it cannot possibly be discriminatory. The fallacy with that argument is that SB 7066 does not equally apply or impact those who lack the financial resources to comply; instead, it serves as another permanent voting ban, but this time based on their income.

As the district court correctly ruled, "Florida . . . cannot deny restoration of a felon's right to vote solely because the felon does not have the financial resources to pay the . . . financial obligations." App. 507 (Doc. No. 207 at 30). The district court relied on a record replete with examples of the various mandatory fees that criminal

defendants have to pay, the interest that accrues on these amounts, and the Plaintiffs' inability to repay debts that, for the *McCoy* Appellees, are in the thousands. *See* App. 117-21 (Doc. No. 98-1 at 15-19); App. 129-32 (Doc. No. 98-1 at 28-30).

Although the U.S. Supreme Court has not defined a suspect class based on economic status, the Court clearly has signaled that unequal access to basic rights—voting being the most fundamental—is unconstitutional under any legal standard of review. *See, e.g.*, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) ("Access to the franchise cannot be made to depend on an individual's financial resources."); *Bearden v. Georgia*, 461 U.S. 660, 671 (1983); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."). In reaching these precedent-setting court decisions, the Court recognized the serious legal and ethical implications of curtailing rights for some simply because they are poor. By doing so, the Court also laid the foundation to successfully attack, especially in the voting rights context, laws like SB 7066 which is a present-day form of wealth-based invidious discrimination.

The *McCoy* Appellees respectfully ask this Court to uphold the district court's decision and protect their right to vote.

SUMMARY OF THE ARGUMENT

The *McCoy* Appellees adopt and incorporate by reference the legal arguments in the opposition briefs filed by the *Gruver* and *Raysor* Appellees. However, the *McCoy* Appellees submit this separate brief to expand upon the consequences of reversing the district court's decision and the public policy reasons for upholding it.

The Supreme Court has struck down laws because of evolving societal values, the magnified negative impact of certain state action, and for reasons of equity and fairness. Defendants-Appellants are asking this Court to convert the fundamental right to vote into a watered-down privilege that's value changes based on the person who seeks access to the ballot. Their notion that the right to vote, in and of itself, is malleable to the point of being virtually inaccessible to huge swaths of our society is, quite frankly, repugnant and an anathema to our county's deep commitment to democracy and representational government. In instances where the Supreme Court has confronted laws similar to SB 7066 in the way it further stratifies people based on discriminatory factors or their unpopularity in society, it has upheld the constitutional right to equal protection. Unfortunately, the state of Florida, led by the Defendants-Appellants in this case, is trying to take us all back to the era when only wealthy people could vote in this country.

Moreover, SB 7066 negatively impacts low-income women of color—particularly Black women—who suffer from the weighty intersection of race-, class-

, and gender-based discrimination. Statistically, women of color continue to make less money than men, have increased financial obligations as heads of households, and are entering the criminal justice system in increased numbers at alarming rates. A significant number of women of color who are under criminal supervision are below, at, or just barely above the poverty line. Upon reentering society, they face more hardships obtaining employment, let alone a livable wage, than their White male, Black male, and White female counterparts. Consequently, women of color are entering and exiting the criminal justice system at a severe economic disadvantage and the *McCoy* Appellees are just two real-life examples of that. If SB 7066's LFO requirement is enforced against them, they most likely will never be able to vote again.

ARGUMENT

The district court correctly ruled that the Plaintiffs are likely to succeed on the merits of their Equal Protection claim pertaining to people unable to pay off their LFOs. As the *Gruver* and *Raysor* Appellees argue, the Supreme Court's decision in *Bearden v. Georgia*, 461 U.S. 660 (1983), clearly establishes that, at a bare minimum, a state must determine one's ability to pay a fee associated with their criminal sentence before depriving them of a substantial or important individual interest. This Court's ruling in *Johnson v. Governor of Florida*, recognizing that "[a]ccess to the franchise cannot be made to depend on an individual's financial

resources," is further support for Plaintiffs-Appellees' claims. 405 F.3d 1214, 1216-17 n.1 (11th Cir. 2005) (en banc) (citing *Harper*, 383 U.S. at 668). Another equally, if not slightly stronger, basis for affirming the district court's decision is the concrete impact of upholding a law that will result in hundreds of thousands of people being shut out of the political process—a process that is most effectively accessed through the power of the vote.

A. SB 7066's LFO Requirement Is a Departure from the Trend Towards Expanding, Not Restricting, Voting Rights for People with Felony Convictions.

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.

Harper, 383 U.S. at 669 (1966).

In *Harper*, the U.S. Supreme Court overruled prior decisions and held that the fundamental right to vote cannot be conditioned on payment of a poll tax, as wealth has "no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 670. The Court decided the case soon after passage of the Voting Rights Act of 1965, a symbol of the nation's readiness to move towards a more egalitarian and participatory election system, free from the suppression and intimidation that African Americans experienced. The ruling was also a firm commitment from the Court to ensure that wealth as a voter

qualification would be forever stamped out. *Harper*, of course, is perfectly on point because it is a voting rights case. However, there are numerous cases in which the Court has departed from the traditional racist and classist underpinnings of our constitutional history in favor of applying long-standing constitutional principles to current-day civil rights violations.

In the seminal case of *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court held that segregation of public schools based on race deprived Black students of equal educational opportunities in violation of the Equal Protection Clause of the Fourteenth Amendment. In doing so, the Court reversed its prior decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which upheld racial segregation in railroad cars as constitutional. *Id.* at 492. In reaching its decision, the *Brown* Court looked to "the effect of segregation itself on public education" and considered public education in the light of its full development and its present place in American life throughout the Nation." *Id.* at 492–93. Only then, the Court held, "can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." *Id.* at 493. The Court also considered public policy concerns with "separate, but equal" public education. Specifically, the Court cited to social science authority and found that racial segregation in education inherently creates a sense of inferiority in Black students, which harms their educational and mental development. *Id.* at 494-95.

Roe v. Wade, 410 U.S. 113 (1973), involved the constitutionality of a state law that criminalized abortion unless it was necessary to save the life of the mother. Looking first to the history of abortion in the United States and how laws and attitudes toward abortion have changed over time, the Court determined that the fundamental right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153, 165 ("This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day.").

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court overruled its prior decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and declared unconstitutional a Texas law that criminalized sexual activity between members of the same sex. The Court held that the law violated a person's right to engage in private, consensual sexual activity. *Id.* at 578. The Court looked to laws and traditions in the preceding fifty years and found "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 571-72. The Court also considered the stigma caused by Texas's law and the harm caused by the Court's prior decision in *Bowers*, noting that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution

endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 579.

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Court held that laws prohibiting same-sex marriage violated a person's fundamental right to marry under the Due Process Clause of the Fourteenth Amendment. In so ruling, the Court acknowledged that its prior decisions concerning the fundamental right to marry "presumed a relationship involving opposite-sex partners." *Id.* at 2598. The Court noted that while "[h]istory and tradition guide and direct this inquiry [into the identification and protection of fundamental rights, they] do not set its outer boundaries." *Id.* The Court recognized that the "generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." *Id.*

The above cases, among others not cited, clearly establish the Court's endorsement of the evolving application of the Equal Protection Clause and the role and importance of examining present-day public policy concerns, including the real-world impact of laws that treat groups of people differently or burden fundamental rights, when determining its meaning. Accordingly, this Court's review of the district court's decision regarding SB 7066 and its denial of voting rights to

Floridians who are unable to pay off LFOs must include an examination of the law's real, present-day effects. Undeniably, SB 7066 will harm more than 80% of Floridians with a felony conviction who are otherwise eligible to vote and will disproportionately disenfranchise women and people of color. *See* Smith Rep., ¶¶ 8, 11, 61, Doc. No. 98-3. Such a result conflicts with sound public policy principles. SB 7066 represents a significant departure from a growing national consensus that believes forever barring people with criminal convictions from the electoral process is bad public policy.[2]

B. The Right to Vote, in and of Itself, Is Fundamental and the Fact that the Person Exercising that Right Has a Criminal Conviction Should Not Change the Equal Protection Analysis.

Defendants-Appellants rely heavily, and mistakenly, on *Richardson v. Ramirez*, 418 U.S. 24 (1974), to support their contention that the right to vote as it pertains to people with felony convictions is immune from constitutional scrutiny. The *McCoy* Appellees adopt and incorporate the *Gruver* and *Raysor* Appellees' rejection of that argument.

[2] The punishment of lifetime disenfranchisement "has become truly unusual, and it is fair to say that a national consensus has developed against it." *Atkins v. Virginia*, 536 U.S. 304, 313–17 (2002) (finding there was national consensus where 30 states prohibited execution of individuals with severe mental disabilities); *see also Graham v. Florida*, 560 U.S. 48, 64–65 (2010) (finding there was national consensus where 11 states imposed life sentences with parole for juvenile non-homicide offenders, but "most of those [did] so quite rarely," while 26 states and the District of Columbia did not impose the punishment).

In *Richardson v. Ramirez*, the plaintiffs were people with felony convictions who had completed their terms in prison and on parole but who, under California law, were still denied the right to vote. The U.S. Supreme Court rejected plaintiffs' claim that this, without more, violated the Equal Protection Clause. *Id.* at 55-56. However, as the district court correctly noted:

> [T]he [*Richardson*] Court did *not* say that because a state could choose to deny all felons the right to vote and to restore none of them, the state's decision to restore the vote to some felons but not others was beyond the reach of the Constitution. Quite the contrary. The Court remanded the case to the California Supreme Court to address the plaintiffs' separate contention that California had not treated all people with felony convictions uniformly and that the disparate treatment violated the Equal Protection Clause. The remand was appropriate because when a state allows some people with felony convictions to vote but not others, the disparate treatment must survive review under the Equal Protection Clause. The same is true here.

App. 502 (Doc. No. 207 at 25) (emphasis in original) (internal citations omitted).

The *McCoy* Appellees have expressed their deep desire to vote and put in the record before the district court their genuine inability to satisfy their LFOs (amounting to over $7,500 for Plaintiff McCoy and almost $15,000 for Plaintiff Singleton). *See* McCoy Decl., ¶¶ 8-11, Doc. No. 98-14; Singleton Decl., ¶¶ 6-11, Doc. No. 98-15. But for their economic status, their ability to vote would be unencumbered and they could use their vote to institute real changes in state and federal laws and policies that harm poor people in the first place. Other than Defendants-Appellants' warped belief that poor people should never be forgiven for

past crimes and their comfortability with the permanent exclusion of a whole class of people from the electorate, Defendants-Appellants otherwise have never identified the danger in allowing Plaintiffs-Appellees to vote because there is none.

C. SB 7066 Has a Disparate Impact on Low-income Women of Color.

There is no escaping the reality that America's election system was founded on the concept that only White men with property should vote. Centuries later, despite tremendous gains made to include women, people of color, and non-wealthy people in our democracy, the state of Florida continues to cling to those discriminatory ideals in the voting rights context. This, of course, is vividly demonstrated in the direct, disparate, and negative impact SB 7066's LFO requirement will have on a population the state knows is least able to satisfy it. If you are already poor and struggle to find steady employment that pays a livable wage, the likelihood that one can fully satisfy all fines, fees, costs, and victim restitution is very small—especially this close to a major election cycle. Therefore, the continuing intersection between voting and wealth is most vividly seen in a felony reenfranchisement law like SB 7066 that conditions the right to vote on the payment of money Plaintiffs-Appellees do not have. In a nation where rates of poverty, incarceration, and unemployment are disproportionately high among people of color and women, the denial of voting rights based solely on one's economic status has a harmful and debilitating impact on these communities.

A deeper dive into statistics quantifying this impact reveals the following:

- "The unemployment rate for formerly incarcerated people is nearly *five times higher* than the unemployment rate for the general United States Population . . . ."[3]

- The challenges of finding employment post-incarceration are most severe for Black women, despite being more likely to be looking for work.[4] Formerly incarcerated Black women have an unemployment rate of 43.6%. The unemployment rates for formerly incarcerated Black men, white women, and white men are 35.2%, 23.2%, and 18.4%, respectively.[5]

- Sixty-two percent of women in prison are mothers to minor children and more likely than men to be the primary caretaker of their children.[6] Thus, incarceration severely impacts mothers and leaves the family even more economically vulnerable upon the mother's release.

- Even when they can find work, formerly incarcerated Black women (who have the hardest time finding work in the first place) are disproportionately working part-time or occasional jobs. Specifically, 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.[7]

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[3] Lucius Couloute & Daniel Kopf, Prison Policy Initiative, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, at fig. 1 (2018) [hereinafter Couloute & Kopf, *Out of Work*] (emphasis in original), https://www.prisonpolicy.org/reports/outofwork.html.
[4] *Id.* at tbl. 3.
[5] *Id.* at fig. 2.
[6] 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.
[7] Couloute & Kopf, *Out of Work*, *supra* note 3, at tbl. 3.

- Women represent one of the fastest growing prison populations.[8] "Nationwide, women's state prison populations grew 834% over nearly 40 years—more than double the pace of the growth among men."[9]

- Efforts to reduce state prison populations have worked for men, but not women. From 2009-2015, the "number of men incarcerated in state prisons fell more than 5% between 2009 and 2015, while the number of women in state prisons fell only a fraction of a percent (0.29%)."[10]

- Economically, formerly incarcerated women face particularly daunting obstacles when they return home.[11] "Even 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."[12]

- "Women's prisons do not meet the need or demand for vocational and educational program opportunities, and once released, the collateral consequences of incarceration make finding work, housing, and financial support even more difficult."[13]

The extreme challenge people with criminal convictions face in finding full-time employment that pays a livable wage presents a serious obstacle in terms of complying with SB 7066's LFO requirement. If women like the *McCoy* Appellees do secure a job, they must still contend with pay inequities that result in fewer financial resources to meet one's daily needs let alone disposable income to satisfy a debt as a precondition to vote. Another dangerous aspect of SB 7066 is that, for

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[8] Sawyer, *The Gender Divide*, *supra* note 6.
[9] *Id.*
[10] *Id.*
[11] Sawyer, *The Gender Divide*, *supra* note 6.
[12] *Id.*; *see also* Bernadette Rabuy & Daniel Kopf, Prison Policy Initiative, *Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned* (2015), https://www.prisonpolicy.org/reports/income.html.
[13] Sawyer, *The Gender Divide*, *supra* note 5.

many families, the law perpetuates the cycle of poverty from which many can barely escape. The imposition of a law that extends the denial of voting rights based solely on one's financial status also means that low-income Floridians with a felony conviction will almost never be able to politically influence the very policies that keep them in these poverty cycles. Considering the economic landscape, it would be difficult to conclude that current elected officials are doing enough to address the problems of a constituency to whom they do not feel beholden.

SB 7066 disproportionately harms Floridians with felony convictions who are low-income, women, and people of color by denying them the fundamental right to vote. Such a result runs counter to well-established public policy that aims to ensure equal treatment under the law and equal access to fundamental rights. This Court should consider this concrete impact and uphold the district court's ruling that Florida cannot deny the right to vote based solely on one's inability to pay LFOs. *See* App. 527 (Doc. No. 207 at 50).

CONCLUSION

SB 7066's LFO requirement completely undermines the significant progress our society, supported by myriad U.S. Supreme Court rulings, has made towards the equality of all people, regardless of wealth or lack thereof. There is no compelling, legitimate, substantial, or rational basis to support this law under the Fourteenth Amendment's Equal Protection Clause. Therefore, for the reasons articulated above,

the *McCoy* Appellees join the *Gruver* and *Raysor* Appellees in respectfully asking this Court to uphold the district court's preliminary injunction.

Dated: January 10, 2020

Respectfully submitted,

/s/ *Nancy G. Abudu*

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,810 words as counted by the word-processing system used to prepare it.

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/s/ *Nancy G. Abudu*
Counsel for McCoy *Appellees*

CERTIFICATE OF SERVICE

I hereby certify that on January 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/ *Nancy G. Abudu*
Counsel for McCoy *Plaintiffs*