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 RAYSOR, HOFFMAN, AND SHERRILL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Bonnie Raysor, Diane Sherrill, and Lee Hoffman (collectively, "*Raysor* Plaintiffs") 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 Defendants-Appellants Governor of Florida and Secretary of State of Florida is complete and correct except for the following corrected or additional interested persons or entities:

1. Nelson, Janai S. - *Attorney for Gruver Plaintiffs/Appellees*
2. Spital, Samuel - *Attorney for Gruver Plaintiffs/Appellees*

/s/ *Danielle M. Lang*
Counsel for Raysor *Plaintiffs-Appellees*

STATEMENT REGARDING ORAL ARGUMENT

This Court has scheduled oral argument to take place on January 28, 2020. Appellees Raysor, Sherrill, and Hoffman agree that oral argument would aid the Court in adjudicating the State's appeal, which seeks to undermine the bedrock constitutional principle that the right to vote cannot be denied on the basis of wealth.

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JURISDICTIONAL STATEMENT

Raysor Appellees[1] agree with Appellants' jurisdictional statement as it applies to Secretary of State Lee. For the reasons stated in *Raysor* Appellees' jurisdictional brief, *Gruver*, *Raysor*, and *Jones* Plaintiffs-Appellees' Jurisdictional Br. ("Jurisdictional Br."), Governor DeSantis has not been harmed by the District Court's preliminary injunction and does not have standing to bring this appeal. Furthermore, because the district court did not reach the issue in granting the preliminary injunction, this Court has no jurisdiction to address the Twenty-Fourth Amendment claims. *See id.*

STATEMENT OF THE ISSUES

Whether the district court correctly enjoined SB-7066's legal financial obligation requirement as applied to those genuinely unable to pay because "access to the franchise cannot be made to depend on an individual's financial resources." *Johnson v. Governor*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005) (en banc).

[1] This appeal involves five cases and four Plaintiff groups consolidated below in *Jones v. DeSantis*, No. 4:19-cv-300. This brief is submitted on behalf of Appellees Raysor, Sherrill, and Hoffman, the individual Plaintiffs in *Raysor et al. v. Lee,* No. 19-cv-301, and the representatives of the putative class pursuant to Fed. R. Civ. P. 23. For brevity, this brief will refer to these individual Plaintiffs as "*Raysor* Appellees" or "*Raysor* Plaintiffs."

STATEMENT OF THE CASE

"[A]ccess to the franchise cannot be made to depend on an individual's financial resources." *Id.* But for the district court's injunction, Plaintiffs would be unable to vote because of their inability to pay outstanding legal financial obligations. This Court need only decide whether the Constitution tolerates such wealth discrimination in voting. Both binding Eleventh Circuit and decades of Supreme Court precedent hold it does not.

I. Statement of Facts

On November 6, 2018, Florida voters approved, by a nearly two-to-one margin, a constitutional amendment ("Amendment 4") that re-enfranchised people with felony convictions "upon completion of all terms of sentence including parole or probation."[2] Fla. Const. art. VI § 4; Doc. 207 at 6.

Before Amendment 4, Florida's felony disenfranchisement law was among the harshest in the nation. Doc. 152 at 27 (Br. of Sentencing Project as Amicus Curiae, *Hand v. Scott*, No. 18-11388, 2018 WL 332853 at *5 (11th Cir. Jun. 28, 2018) ("Sentencing Project Br.")). Florida alone accounted for over one-quarter of all U.S. citizens disenfranchised due to criminal history. *Id.* at *14-16. Over 1.6

[2] Those convicted of murder or felony sexual offenses do not qualify for automatic rights restoration and must receive clemency to restore their voting rights. Fla. Const. art. VI, § 4. That exclusion is not at issue. When this brief refers to people with felony convictions, it excludes those with disqualifying convictions.

million Floridians, nearly 1.5 million of whom had completed all terms of incarceration and supervision, were excluded. *Id.* at *15. More than ten percent of Florida's voting age population, and more than twenty percent of Florida's Black voting age population, were permanently disenfranchised under this scheme. *Id.* at *14-16. In 2018, Floridians overwhelmingly voted to restore their fellow citizens' voting rights.

Last May, the Florida Legislature enacted Senate Bill 7066 ("SB-7066"). 2019-162 Fla. Laws. For purposes of voting rights restoration, SB-7066 defined "completion of all terms of sentence including probation and parole" to include "full payment of restitution" and "full payment of fines or fees ordered by the court as part of the sentence or . . . as a condition of any form of supervision."[3] *Id.* at 28 (codified at Fla. Stat. § 98.0751(2)(a)(5)).

Conversion of LFOs to civil liens "is a longstanding Florida procedure that courts often use for obligations a criminal defendant cannot afford to pay" that "takes the obligation out of the criminal justice system." Doc 207 at 7, 12. In FY 2017-2018, over half of LFOs imposed by Florida Circuit Criminal Courts were converted

[3] The precise parameters of the challenged SB-7066 provisions remain unclear—even to Secretary Lee. *See* Doc. 152-94 ¶ 23 (noting the Secretary's office was "still working to determine "what [LFOs] are part of the sentence and the current status of those [LFOs]"); Doc. 152-85 at 142:6-13; 151:3-4 (deposition of Bureau of Voter Registration Services Chief) ("I am still unclear as to what fines and fees have to be completed.").

to civil liens. Doc. 152 at 28 (Fla. Clerks and Comptrollers, 2018 Annual Assessments and Collections Report at 10, https://flccoc.org/wp-content/uploads/2018/12/2018-Annual-Assessments-and-Collections-Report.pdf) ("Clerks Report"). Nonetheless, SB-7066 specifies that "[t]he requirement to pay any financial obligation . . . is not deemed completed upon conversion to a civil lien." *Id.*

Instead, LFOs are deemed complete only upon: (1) "[a]ctual payment of the obligation in full"; (2) "termination by the court of any financial obligation" with the payee's consent; or (3) "[c]ompletion of all community service hours if the court, unless otherwise prohibited by law or the State Constitution, converts the financial obligation to community service." Fla. Stat. § 98.0751(2)(a)(5)(e). A court may also modify the sentencing order to no longer require completion of LFOs. *Id.*

Notwithstanding these provisions, SB-7066 provides no meaningful remedy for those who cannot pay their LFOs. Indeed, SB-7066 never mentions ability to pay. *See id.* First, the SB-7066 "alternatives" are not available to people with out-of-state or federal convictions. Doc. 207 at 38-40. Second, termination is only permitted upon explicit approval of the payee in open court or via notarized document. Fla. Stat. § 98.0751(2)(a)(5)(e). Third, termination, modification, and conversion to community service are all discretionary and do not require consideration of financial resources. *Id*.

SB-7066 appears to add nothing to the pre-existing and rarely utilized mechanism for conversion to community service. Of the over $214 million in fines and other monetary penalties imposed by Circuit Criminal Courts last fiscal year, fewer than one million were converted to community service. Doc. 152 at 28 (Clerks Report at 10). *None* of the over $46 million in fees, service charges, and costs assessed against criminal defendants were converted to community service. *Id.* Moreover, individuals performing court-ordered community service receive credit at the federal minimum hourly wage of $7.25. Fla. Stat. § 318.18(8)(b)(1)-(2). At that rate, most people seeking to complete their LFOs through community service "would miss many votes before they could satisfy their financial obligations in this way, even if allowed to do so, and some plaintiffs would never be able to satisfy their obligations." Doc. 207 at 39.

Governor DeSantis signed SB-7066 on June 28, 2019, stating his belief that Florida voters' approval of Amendment 4 was a "mistake." Doc. 152 at 26.

Impact of SB-7066's LFO Requirements

Most Floridians with convictions exit the criminal justice system saddled with debt. Florida funds its court system largely with revenue collected from fines, fees, surcharges, and costs imposed on criminal defendants. *See* Fla. Const. art. V, § 14; Doc. 207 at 42. The mandatory fees and costs imposed on criminal defendants—regardless of ability to pay—are at least $548 for every defendant and at least $698

for those with court-appointed lawyers. Doc. 207 at 42-43. In addition, many criminal defendants face steep mandatory fines for their offenses, also imposed regardless of inability to pay, up to $750,000 and no lower than $25,000 for drug trafficking convictions. *See, e.g.*, Fla. Stat. § 893.13(1)(c)(3); Fla. Stat. § 893.135. Restitution, likewise, is imposed without determining the defendants' ability to pay. *See Noel v. State,* 191 So.3d 370, 375 (Fla. 2016).

Many returning citizens simply cannot afford to pay their LFOs, nor does Florida anticipate payment. In 2018, the Circuit Criminal Courts reported a collection rate of only 20.55% and categorized 85.79% of LFOs as "at risk"—meaning there are "minimal collections expectations" due to defendants' inability to pay. Doc. 152 at 28 (Clerks Report at 11). Thus, it is not surprising that approximately eighty percent of people who have completed all terms of incarceration and supervision still have outstanding LFOs. Doc. 207 at 18. Importantly, both parole and probation require regular payment of LFOs—including costs of supervision—and failure to pay, absent evidence of inability to pay, justifies the revocation of parole or probation. *See, e.g.*, Fla. Stat. §§ 947.181, 947.21, 948.03, 948.032, 948.06, 948.09. People who have been released from supervision but still owe LFOs have not shirked their obligations; they simply owe more than they can pay.

Implementation of SB-7066

SB-7066 went into effect on July 1, 2019. 2019-162 Fla. Laws. However, Florida still lacks processes to implement SB-7066's LFO requirements, largely because no one—not potential voters, nor supervisors of elections, nor clerks, nor the Secretary of State—has access to reliable data on outstanding LFOs.[4] Doc. 207 at 43 (Florida's LFO records are "decentralized, often accessible only with great difficulty, sometimes inconsistent, and sometimes missing altogether."); Doc. 239 at 23:17-22. Thus, as of October 8, Secretary Lee did not have access to reliable information on disqualifying LFOs and therefore was not identifying individuals with outstanding LFOs for removal from the rolls. Doc. 152-93 at 174:5-11; Doc. 152-103, at 1; Doc. 152-85 at 67:17-18, 123:7-9. At a December 3 hearing, Defendants' counsel indicated that the Secretary would begin identifying individuals with outstanding LFOs for removal. Doc. 239 at 25:19-26:1. *Raysor* Plaintiffs are unaware what, if anything, has changed such that the Secretary now has access to the requisite "credible and reliable evidence" to identify such individuals.

[4] The Restoration of Voting Rights Work Group—created by SB-7066—issued extensive recommendations to the Legislature regarding the overhaul of record-keeping and access to records necessary to implement SB-7066's LFO requirements. Doc. 240-1 at 19, 22, 24. These recommendations, which have not been implemented, confirm that the status quo leaves both voters and election officials in the dark in determining eligibility for people with past convictions. Further, it appears *no* governmental entity tracks outstanding restitution. Doc. 167-76 at 3 ("Restitution is a big problem"); Doc. 153-3, 86:25-87:17 (deposition of court clerk).

II. Proceedings Below

This appeal involves five consolidated cases. *See* Defendants-Appellants' Brief ("Defs. Br.") at 10. The *Raysor* Plaintiffs brought the following claims: (1) SB-7066's LFO requirements, absent an ability to pay inquiry, constitute wealth disenfranchisement in violation of the Fourteenth Amendment; (2) SB-7066's LFO requirements impose poll taxes in violation of the Twenty-Fourth Amendment; (3) portions of SB-7066's LFO requirements, as applied, are unconstitutionally vague; (4) the Secretary's implementation of SB-7066's LFO requirements violates procedural due process; and (5) SB-7066's voter registration provisions violate the National Voter Registration Act. Related Case No. 4:19-cv-301, Doc. 12 ¶ 106-158. Only the first claim is at issue in this appeal.

After a two-day evidentiary hearing, the district court denied Secretary Lee's motion to dismiss or abstain and granted Plaintiffs' motion for a preliminary injunction in part. Doc. 207. Secretary Lee's motion relied on her assertion that Amendment 4 independently requires payment of LFOs and Governor DeSantis's request to the Florida Supreme Court for an advisory opinion on the meaning of Amendment 4.[5] Doc. 97. For purposes of deciding the preliminary injunction, the

[5] The Florida Supreme Court heard oral argument on November 6 but has not yet issued its advisory opinion. *In re Opinion to the Governor Re: Implementation of Amendment 4,* No. SC19-1341 (Fla. Aug. 9, 2019).

district court assumed Amendment 4's meaning mirrors SB-7066 and concluded that interpretation would not change the ruling. Doc. 207 at 23.

On the merits, the district court acknowledged a state's right under *Richardson v. Ramirez*, 418 U.S. 24 (1974), to disenfranchise people with felony convictions and the "considerable leeway" a state has in shaping its rights restoration procedures. Doc. 207 at 28. Indeed, the court went so far as to conclude that a state can constitutionally "decide that the right to vote should not be restored to a felon who is able to pay but chooses not to do so."[6] *Id*.

Yet, the district court also recognized that rights restoration is not a constitution-free zone. *Id.* at 29-35. Following a binding and controlling *en banc* decision of this Court in the context of voting rights restoration for people with convictions, the district court concluded the command in that case governs: "Access to the franchise cannot be made to depend on an individual's financial resources." *Id.* at 29; *Johnson*, 405 F.3d at 1216-17 n.1 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966)). In *Johnson*, this Court held that the challenged rights restoration process was constitutional "*because* Florida [did] not deny access to the restoration of the franchise based on ability to pay." 405 F.3d at 1216-17 n. 1 (emphasis added).

[6] This ruling was limited to the Fourteenth Amendment claim and does not extend to the Twenty-Fourth Amendment analysis. Doc. 207 at 27.

Because SB-7066 *does* deny access to the restoration of the franchise based on ability to pay, the district court concluded that its LFO requirements are unconstitutional as applied to those genuinely unable to pay. Doc. 207 at 30. The district court explained that its ruling—and *Johnson*'s—are consistent with a line of Supreme Court wealth-discrimination cases holding that political participation "cannot be limited to those who can pay for a license" and "punishment cannot be increased because of a defendant's inability to pay." *Id.* at 32-33 (citing *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) and *Bearden v. Georgia*, 461 U.S. 660 (1983)).

The district court ordered a limited remedy, ruling that *Johnson* requires only that the State adopt "an appropriate procedure through which the plaintiffs can attempt to establish genuine inability to pay," and that if an otherwise eligible voter establishes an inability to pay, they must be permitted to vote. *Id.* at 50-51. The court, in the first instance, left the particulars of that process to the Secretary's discretion.

The wealth-discrimination claim is the only claim upon which the district court granted relief. *Id.* at 53-54. With respect to the Twenty-Fourth Amendment, the court explained that the merits would turn on whether the various LFOs constitute taxes. *Id.* at 41. But while the court opined on which LFO may constitute taxes—noting that "it is far from clear" that costs and fees are "not tax[es]"—the court declined to rule on this claim. *Id.* at 42-43. With respect to Plaintiffs' procedural due process and vagueness claims, the district court noted that they had

"considerable force" given the disarray of Florida's criminal records. *Id.* at 43. Nonetheless, the court declined to grant a preliminary injunction on these grounds, relying largely on the assumption that the Secretary would not require potential voters to risk criminal prosecution to determine their eligibility. *Id.* at 44-50.

Immediately after the district court's order, the Governor issued a statement *agreeing* with the decision and "recognizing the need to provide an avenue for individuals unable to pay back their debts as a result of true financial hardship." Doc. 244 at 5. Despite initially suggesting she would do so, Secretary Lee has taken no affirmative actions to implement the district court's limited ruling. Doc. 239 at 33:2-34:17. Nearly a month after the district court ruled, Secretary Lee filed a notice of appeal. Doc. 219.

On November 27, Secretary Lee moved the district court for a stay pending appeal and on December 6 sought an expedited schedule from this Court. On December 19, the district court stayed the preliminary injunction in part. Doc. 244 at 2. The district court did not stay the provisions of the preliminary injunction allowing those who assert an inability to pay to register to vote, but did stay the provisions allowing plaintiffs to cast a ballot. *Id.* That stay dissolves on February 11, 2020. *Id.*

III. Standard of Review

The standard for a preliminary injunction requires the party seeking relief to show:

> (1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

Callahan v. United States Dep't of Health & Human Servs., 939 F.3d 1251, 1257 (11th Cir. 2019).

Appellate review of a district court's grant or denial of a preliminary injunction is "very narrow." *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 968 (11th Cir. 2005). A district court's preliminary injunction decision will not be reversed absent a "clear abuse of discretion." *Id.* As this Court has explained:

> [P]reliminary injunction proceedings often create[] not only limits on the evidence available but also pressure to make difficult judgments without the luxury of abundant time for reflection. Those judgments, about the viability of a plaintiff's claims and the balancing of equities and the public interest, are the district court's to make and we will not set them aside unless the district court has abused its discretion . . . .

Cumulus Media, Inc. v. Clear Channel Comms., Inc., 304 F.3d 1167, 1171 (11th Cir. 2002). A district court's legal determinations are reviewed de novo, while its factual findings will not be disturbed unless clearly erroneous. *Democratic Exec. Committee of Fla. v. Lee,* 915 F.3d 1312, 1317 (11th Cir. 2019).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion by preliminarily enjoining SB-7066's LFO requirements as applied to otherwise eligible voters who are genuinely unable to pay their outstanding LFOs.

The result below is compelled by binding *en banc* Eleventh Circuit precedent holding, in the context of voting rights restoration, that "[a]ccess to the franchise cannot be made to depend on an individual's financial resources." *Johnson,* 405 F.3d at 1216 n.1.

A long line of Supreme Court precedent establishes that states cannot constitutionally deny the right to vote because of impecunity or impose additional punishment on criminal defendants solely because of inability to pay fines or fees. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) ("To introduce wealth . . . as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."); *Bearden v. Georgia*, 461 U.S. 660, 671 (1983) (holding the State may not "punish[] a person for his poverty"). SB-7066 does both.

Prolonging Floridians' disenfranchisement simply because they lack the wealth to pay their outstanding LFOs serves no state interest. It does not "aid[] collection of the revenue." *Tate v. Short*, 401 U.S. 395, 399 (1971). One cannot wring blood from a stone; the State retains far more effective means of "exacting

compliance" if individuals later acquire assets enabling them to pay. *Zablocki v. Redhail,* 434 U.S. 374, 389 (1978).

Secretary Lee cannot distinguish *Harper* nor *Bearden.* The lawfulness of felony disenfranchisement under *Richardson v. Ramirez,* does not insulate re-enfranchisement schemes from constitutional scrutiny, as *Richardson* itself establishes. 418 U.S. at 56 (remanding Equal Protection challenge). Nor is the *Griffin-Bearden* line of cases limited to incarceration or fundamental rights (although voting is one). The Supreme Court has repeatedly and expressly rejected any limitation to incarceration, *see, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996), and *Bearden* is a case about probation, a statutory benefit to which a criminal defendant has no constitutional right. In both *Bearden* and this case, the plaintiffs have lawfully been stripped of the fundamental right at issue—liberty in *Bearden* and voting here. The question is whether restoration of that right can hinge on ability to pay. It cannot.

Plaintiffs' Twenty-Fourth Amendment claim is outside the jurisdiction of this appeal. The injunction below does not rest on the Twenty-Fourth Amendment. The Twenty-Fourth Amendment would not be a proper alternative ground for affirmance because it would require a different result. And addressing this issue in the first instance on appeal would be particularly inappropriate here where the requisite "functional approach" to determine whether LFOs constitute "other tax[es]" requires

factual findings not yet developed or made by the district court. Doc. 207 at 41. If this Court nonetheless reaches the merits, LFOs share the essential characteristics of taxes, namely, the production of "at least some revenue for the Government." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564 (2012). Thus, the Twenty-Fourth Amendment's prohibition on denying or abridging the right to vote because of failure to pay any tax bars SB-7066's LFO requirements.

Finally, the district court ordered a proper limited injunction. Secretary Lee's gambit arguing that the district court's as-applied ruling dooms Amendment 4 as a whole fails. Decades of precedent demonstrate that as-applied cases do not implicate a severability analysis. Moreover, Secretary Lee has conceded that Amendment 4—even if it includes LFOs—does not necessarily require *payment* of LFOs but rather could be satisfied by another statutory mechanism. Finally, any *sub silentio* LFO requirement lurking within Amendment 4 is severable. All of the other preliminary injunction factors weigh heavily in Plaintiffs' favor since a contrary result would deny Plaintiffs the right to vote.

This Court should affirm the district court's proper application of longstanding Supreme Court and Eleventh Circuit binding precedent ensuring that the right to vote, preservative of all other rights, is not doled out based on who can pay.

ARGUMENT

I. The State Cannot Condition the Right to Vote on Ability to Pay.

A. *Johnson*'s Holding that Access to the Right to Vote Cannot Be Conditioned on Wealth Controls this Case.

The district court's preliminary injunction rests on controlling precedent from this Court sitting *en banc*: "Access to the franchise cannot be made to depend on an individual's financial resources." *Johnson*, 405 F.3d at 1216 n.1. As the district court noted, the relevant portion of *Johnson* addressed the precise issue on appeal—wealth-discrimination in access to voting—in this precise context—rights restoration. Doc. 207 at 29.

Prior to Amendment 4, the only mechanism for rights restoration was through the Florida Clemency Board, which has discretion to restore an individual's voting rights. In *Johnson*, the plaintiffs challenged the then-applicable Rules of Executive Clemency, which required applications by individuals with outstanding restitution to be decided at a hearing rather than on the papers. 405 F.3d at 1216 n.1. The plaintiffs raised both Fourteenth Amendment wealth-discrimination and Twenty-Fourth Amendment poll tax claims. Addressing the wealth-discrimination claim, the *en banc* Court stated: "Access to the franchise cannot be made to depend on an individual's financial resources." *Id.* But, the Court concluded that access to the franchise under the clemency rules was not dependent on an individual's financial resources because those with outstanding restitution could still apply. *Id.* Regardless

of whether an individual had outstanding restitution, rights restoration was discretionary. The only difference was a hearing requirement. Thus, this Court affirmed the ruling below: "*[b]ecause* Florida does not deny access to the restoration of the franchise based on ability to pay."[7] *Id.* SB-7066 *does* deny access to the restoration of the franchise based on ability to pay, thus *Johnson* controls. The LFO requirements are unconstitutional as applied to those unable to pay.

Given this Court's strict adherence to the prior panel rule, the force of its *en banc* decisions on future panels is obvious. *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019) ("The prior panel precedent rule applies regardless of whether the later panel believes the prior panel's opinion to be correct, and there is no exception to the rule where the prior panel failed to consider arguments raised before a later panel."). This Court need go no further than *Johnson* to affirm.

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[7] As the district court explained, these statements are not dicta:

> The footnote explains precisely why the court reached its decision on one of the issues in the case. The explanation was this: a state cannot refuse to restore a felon's right to vote because of inability to pay restitution, but the plaintiffs did not establish a violation of that principle. Their claim failed "because"—as clear a statement as one can have that this was the basis for the decision—state law allowed restoration of a felon's right to vote through the Executive Clemency Board without requiring payment of amounts the felon could not pay.

Doc. 207 at 31. *See United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019) ("The holding of a case comprises both the result of the case and those portions of the opinion necessary to that result.").

On appeal, Secretary Lee argues for the first time[8] that *Johnson* does not control because of the final sentence in the footnote: "[W]e say nothing about whether conditioning an application for clemency on paying restitution would be an invalid poll tax." *Johnson*, 405 F.3d at 1216 n.1. Based on this caveat, Secretary Lee now argues that *Johnson* "expressly with[held] judgment on the issue in question." Defs. Br. at 20. This argument is meritless.

The *Johnson* caveat has nothing to do with the constitutional question at issue: whether the right to vote can be withheld on the basis of inability to pay LFOs. That issue *was* addressed by the *Johnson* court. The *Johnson* court merely withheld judgment as to whether a requirement to pay restitution for a clemency application would be an unconstitutional poll tax.

As the district court explained in its recent order on the stay motion:

> A poll tax, of course, is unconstitutional regardless of ability to pay. Whether a person can be required to pay a sum as a condition of voting, regardless of ability to pay, is a different issue from whether a person can be denied the right to vote for failing to pay an otherwise-proper exaction that the person is genuinely unable to pay. . . . When it issued *Johnson*, the Eleventh Circuit surely understood the difference between

[8] Remarkably, despite Plaintiffs' reliance on *Johnson* below, Secretary Lee made no arguments regarding *Johnson* below. *See* Doc. 244 at 7 ("Having made no effort to come to grips with *Johnson* in advance, the Governor's and Secretary's newfound criticism of the October 18 order rings hollow.").

Thus, Secretary Lee's post-hoc attempt to dismiss *Johnson* cannot be credited at this late stage. *See Hurley v. Moore*, 233 F.3d 1295, 1297 (11th Cir. 2000) ("Arguments raised for the first time on appeal are not properly before this Court."); *FDIC v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir. 1993).

> the Fourteenth and Twenty-Fourth Amendments and between a poll-tax claim and an inability-to-pay claim.

Doc. 244 at 6-7. Thus, Secretary Lee is correct that *Johnson* "said '*nothing*'" on whether conditioning clemency on payment of restitution "would be an invalid poll tax."[9] Defs. Br. at 20. But *Johnson* did not, as she suggests, say nothing about "whether it would be constitutional as applied to those who lacked the ability to pay." *Id. Johnson* said: "Access to the franchise cannot be made to depend on an individual's financial resources." *Johnson*, 405 F.3d at 1216 n.1.

B. The Supreme Court's Wealth Discrimination Cases—from *Harper* to *Bearden*—Underpin the District Court's Tailored Injunction.

Even if *Johnson* did not resolve this case, a long line of Supreme Court cases compels the result below. Although wealth is not a "suspect class," a well-established line of cases makes clear that the State is not free to deny access to a significant interest or impose additional punishment based solely on inability to pay, even when the State has no initial obligation to extend the benefit or right. The principle announced in *Johnson* and applied by the district court sits directly at the intersection of those cases and undoubtedly falls within their scope. The State cannot

[9] Secretary Lee also fails to grapple with the distinction between a clemency application and the operation of SB-7066. Clemency is discretionary and relieves people with convictions from punishment duly imposed. Amendment 4 and SB-7066 set affirmative limits on felony disenfranchisement and impose generally applicable rules for access to the right to vote after a conviction. As such, the Eleventh Circuit's admonition that access to the franchise cannot be conditioned on wealth applies here with even greater force.

condition a right as important as the franchise on ability to pay, even it can otherwise lawfully restrict it on other grounds.

In *Griffin v. Illinois,* the Supreme Court held that that the Equal Protection and Due Process Clauses prohibit the denial of trial transcripts to indigent defendants who cannot pay the requisite transcript fees. 351 U.S. 12, 18 (1956). Even though "a State is not required by the Federal Constitution to provide . . . a right to appellate review at all," if it does provide such review, it cannot do so "in a way that discriminates against some convicted defendants on account of their poverty." *Id*. Likewise, once the state decides to restore voting rights to people with convictions, in cannot do so "in a way that discriminates against some convicted defendants on account of their poverty." *See id.*

Following *Griffin*, the Court invalidated many other instances of wealth discrimination. *See, e.g., Williams v. Illinois*, 399 U.S. 235 (1970) (prolonged incarceration due to involuntary nonpayment); *Tate,* 401 U.S. 395 (conversion of fine to incarceration for defendants unable to pay); *Mayer v. City of Chicago*, 404 U.S. 189 (1971) (denial of appellate transcripts to those unable to pay even where defendant faced only a fine); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (denial of divorce proceeding to those unable to pay fees and costs); *Zablocki,* 434 U.S. 374 (denial of marriage certificate to people not current on child support obligations); *Bearden*, 461 U.S. 660 (revocation of probation for failure to pay absent

determination of ability to pay); *M.L.B.*, 519 U.S. 102 (denial of appeal of termination of parental rights to those who cannot pay record costs).

The Supreme Court has synthesized this line of cases on more than one occasion and each formulation of this body of law confirms the proper application of the wealth-discrimination doctrine by the district court.

1. *The* M.L.B. *Exceptions*

a. The Right to Vote Can Never Hinge on Ability to Pay.

Most recently, the Court explained that there are at least two exceptions to the general rule that fee requirements are subject to rational basis review. Doc. 207 at 32 (citing *M.L.B.*, 519 U.S. at 123-24). The first exception presages *Johnson* and applies here: "The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license." *Id.* The landmark case establishing this principle is *Harper*, which not only held poll taxes unconstitutional in state elections but also established the broader principle that "wealth . . . is not germane" to voting. 383 U.S. at 668 (citing *Griffin*, 351 U.S. 12); *see also id.* ("To introduce wealth . . . as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."). Thus, "a State violates the Equal

Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter . . . an electoral standard."[10] *Id.* at 666.

The Court has applied this principle expansively, closely scrutinizing candidate filing fees because their impact on the franchise "is related to the resources of the voters supporting a particular candidate." *Bullock v. Carter,* 405 U.S. 134, 144 (1972); *see also Lubin v. Panish*, 415 U.S. 709, 718 (1974) ("Selection of candidates solely on the basis of ability to pay a fixed fee . . . is not reasonably necessary to the accomplishment of the State's legitimate election interests."). Moreover, *Harper* itself made clear that it was prohibiting wealth discrimination in voting *regardless* of whether the right to vote could otherwise be restricted. 383 U.S. at 665 ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). Because SB-7066 does precisely what *Harper* prohibits—makes affluence an electoral standard for otherwise eligible voters who cannot afford to pay their outstanding LFOs—it violates the Fourteenth Amendment.

[10] Since *Harper* addressed not only poll taxes but also the broader question of wealth discrimination in voting, Secretary Lee's attempt to distinguish *Harper* as solely a poll tax case fails. Defs. Br. at 22 n.3.

b. The State Cannot Impose Additional Punishment Solely Because of Inability to Pay.

The second exception outlined in *M.L.B.* also applies. "Cases applying this exception hold that punishment cannot be increased because of a defendant's inability to pay." Doc. 207 at 32 (citing *Bearden*, 461 U.S. 660). This Court has already recognized that felony disenfranchisement is a "punitive device stemming from criminal law." *Johnson*, 405 F.3d at 1228; *id.* at 1218 n. 5. Other courts agree. *See Muntaqim v. Coombe*, 366 F.3d 102, 123 (2d Cir. 2004), *vacated on other grounds*, 449 F.3d 371 (2d Cir. 2006) (en banc); *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).

Indeed, the Readmission Act of Florida allows for felony disenfranchisement only *if* it is imposed as punishment. Act of June 25, 1868, ch. 70, 15 Stat. 73, 73 (prohibiting any change to the state constitution that "deprive[s] any citizen or class of citizens of the United States of the right to vote . . . except as punishment for such crimes as are now felonies at common law").

Secretary Lee admits that Florida's felony disenfranchisement scheme is inherently punitive: "The overall intent of Amendment 4 was . . . to restore felons' voting rights only when their punishment was complete—when they paid their debt to society." Defs. Br. at 45 (internal quotation marks omitted). Thus, "this second *M.L.B.* exception is fully applicable." Doc. 207 at 33. And, because SB-7066's LFO requirements "punish[] [those who are unable to pay] for [their] poverty," they are

"contrary to the fundamental fairness required by the Fourteenth Amendment." *Bearden*, 461 U.S. at 671, 673; *see also United States v. Plate*, 839 F.3d 950, 956 (11th Cir. 2016) ("Plate was treated more harshly in her sentence than she would have been if she (or her family and friends) had access to more money, and that is unconstitutional.").

2. The *Bearden* Factors

In *Bearden*, the Court synthesized its wealth-discrimination cases as requiring a "careful inquiry" into four factors: (1) "the nature of the individual interest affected," (2) "the extent to which it is affected," (3) "the rationality of the connection between legislative means and purpose," and (4) "the existence of alternative means for effectuating the purpose." 461 U.S. at 666–67 (quotations omitted). Under this formulation, SB-7066's denial of the right to vote to those unable to pay also fails.

a. The Right to Vote is Paramount and SB-7066 Denies It to Those Unable to Pay.

The first two factors—the nature of the interest and the extent to which it is affected—weigh in Plaintiffs' favor. First, the nature of the interest—access to the franchise—is paramount. *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) ("There is no right more basic in our democracy than the right to participate in electing our political leaders."). The right to vote is not only a "fundamental political right"; it is "preservative of all rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Just as the

lawful restriction of the right to liberty after a conviction did not make liberty a less important interest in *Bearden*, the lawful restriction of Plaintiffs' right to vote after their convictions does not diminish its importance.

Second, Plaintiffs' interest in voting has been affected to the fullest possible extent; it has been completely denied. Individuals who are unable to fulfill their outstanding LFOs cannot avail themselves of rights restoration under SB-7066. Absent the district court's injunction, Plaintiffs cannot vote; others who can pay their LFOs can. This should end the inquiry.

Thus, it is unsurprising that Secretary Lee devotes a mere four sentences to argue otherwise, based on the availability of purely discretionary avenues for rights restoration. Defs. Br. at 31-32. But the fact that some individuals might, hypothetically, succeed in accessing the right to vote through an act of grace by a sentencing court or Clemency Board is irrelevant. The SB-7066 alternatives are all discretionary, do not *mention* ability to pay, and do not change the status quo. *See supra* at 4-5. Nor do they provide any remedy for those with out-of-state or federal convictions. Doc. 207 at 39. Notably, SB-7066 specifically *excludes* civil liens, the mechanism by which Florida courts ordinarily address inability to pay. Doc. 207 at 7, 12. Moreover, SB-7066 vests not only courts but also *private parties* (including collections agencies) with discretion over citizens' voting rights. Fla. Stat. § 98.0751(2)(a)(5)(e)(II) (granting payees the right to deny termination); *e.g.*, Doc.

167-35 at 3, 167-36 at 2 (showing collection agencies' discretion to negotiate and terminate LFO debt).[11] And even if granted, the community service provision provides a "wholly illusory" mechanism for satisfying LFOs given the low hourly rates at which community service is credited. Doc. 207 at 39. In the meantime, Plaintiffs and others will certainly miss many votes that those able to pay would not. *Id.*

The clemency option is equally illusory. Clemency is discretionary and routinely denied. *See* Fla. R. Exec. Clemency 4; Doc. 152 at 27 (Sentencing Project Br. at *12). The Clemency Board imposes five- and seven-year waiting periods prior to application, *see* Fla. R. Exec. Clemency 5, 9, during which the right to vote is denied. Moreover, under the current Clemency Board Rules, payment of restitution and certain LFOs imposed pursuant to Chapter 960 *are* required. *See id.* R. 5(E). Finally, as the district court found, "[t]he Board has operated without articulated standards, and . . . has moved at glacial speed."[12] Doc. 207 at 5. Secretary Lee cannot

[11] Allowing private collections agencies to decide when a person is eligible to vote is one of the many irrational consequences of SB-7066.

[12] The district court's factual finding that the current clemency process could not provide "an available remedy in fact," is reviewed for clear error, as is the finding that the community service option is "often wholly illusory." Doc. 207 at 36, 39; *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1317. Secretary Lee presented *no* evidence suggesting that these purported solutions provide relief as a factual matter.

rely on a discretionary (and poorly functioning) process that itself hinges on payment of LFOs to excuse SB-7066's failure to account for ability to pay.

In *Johnson*, clemency was the only rights restoration mechanism available; thus, the fact that it was open to those unable to pay—albeit with a hearing—was sufficient. 405 F.3d at 1216 n.1. *Johnson* stands for the proposition that the State must "allow[] the lack of financial resources to be addressed as part of the same process through which other felons may obtain restoration of the right to vote" or another "equally accessible" method. Doc. 207 at 30. It is no answer to say that while those who can pay can automatically register, those who cannot must plead for an act of grace. *See, e.g., Bearden*, 461 U.S. 660 (prohibiting imprisonment of probationer solely due to inability to pay LFOs); *Mayer*, 404 U.S. at 196-97 ("*Griffin* [represents] a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way.").

This Court has held that only "marginal" differences in the treatment of indigents can pass muster under the *Bearden* test. *Walker v. City of Calhoun*, 901 F.3d 1245, 1263 (11th Cir. 2018) (holding that a 48-hour increase in length of incarceration due to inability to pay bail is constitutional but an 11-day delay would

be unconstitutional). The difference between automatic restoration under SB-7066 and seeking discretionary clemency is anything but "marginal."[13] *Id.*

b. SB-7066's LFO Requirements Irrationally Connect Voting to Wealth and Alternative Means of Enforcement Exist.

As for the latter two *Bearden* factors—the rationality of the connection between legislative means and purpose, and the existence of alternate means—SB-7066 fares no better. Secretary Lee argues that the "State surely has a legitimate interest in promoting the rule of law by insisting that all felons fully repair the harm that they have wrought on society."[14] Defs. Br. at 28. True enough. However, it is irrational to connect this interest to the right to vote where individuals are unable rather than unwilling to pay. By doing so, SB-7066 makes the wealth the dividing line between those who can and cannot vote. "To introduce wealth or payment of a

[13] In *San Antonio Indep. Sch. Dist. v. Rodriguez,* the Court explained that wealth discrimination plaintiffs are successful when "two distinguishing characteristics" are present: "because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." 411 U.S. 1, 20 (1973). Notably, this was in a case about public education, outside of both *M.L.B.* exceptions. Thus, *Rodriguez*'s "absolute deprivation of the desired benefit," test is a stricter than usual articulation of the Supreme Court's wealth-discrimination doctrine. Yet, it is met here. Because SB-7066 denies people who are unable to pay their LFOs access to non-discretionary voting rights restoration, it violates the Fourteenth Amendment.

[14] Only some of the LFOs required to be paid by SB-7066 are reasonably related to the "harm that [Plaintiffs] have wrought on society." Many are purely administrative fees imposed to recoup costs, unrelated to the level of culpability of the crime, and imposed regardless of whether adjudication is withheld. *See infra* at 42-43.

fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Harper*, 383 U.S. at 668; *see also id.* ("Wealth . . . is not germane [to voting]."). Disenfranchising individuals who cannot pay their LFOs while enfranchising those who can does nothing to promote the "rule of law." Defs. Br. at 28.

Nor does prolonging disenfranchisement for people unable to pay "aid[] collection of the revenue." *Tate*, 401 U.S. at 399; *see also Bearden,* 461 U.S. at 670 ("Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming."); *Zablocki*, 434 U.S. at 389 (imposing requirement on those unable to pay will not "deliver[] any money at all").

Plaintiffs do not seek to relieve themselves of their legal obligation to pay their LFOs in accordance with their ability to do so. Florida will retain all its various means of collecting that debt even when Plaintiffs' rights are restored. Secretary Lee cannot contend that withholding the right to vote is a more effective means of extracting payment than other available means. *See, e.g.*, Fla. Stat. §§ 28.246(6) (authorizing referral to collection agencies); 77.0305 (authorizing garnishment of wages); 932.704 (authorizing civil forfeiture proceedings). Where "other means for exacting compliance with [payments]" exist that are "at least as effective," *Zablocki*, 434 U.S. at 389, it "necessarily casts considerable doubt upon the proposition that

the [new provision] could rationally have been intended to prevent those very same abuses." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 537 (1973). Beyond being unproductive, such a method of debt collection is unduly harsh and discriminatory. *See James v. Strange*, 407 U.S. 128, 138 (1972) (holding that a state "may not impose unduly harsh or discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor").

Secretary Lee also invokes "administrative costs" to defend SB-7066 as crafted. Defs. Br. at 30. First, if the cost to the state of identifying those unable to pay were sufficient to defeat a wealth discrimination claim, none would prevail. Secretary Lee cites to no wealth discrimination challenge that was defeated because of expense to the State.

Second, Secretary Lee's invocation of administrative expenses is ironic; it is the *inclusion* of LFOs as a condition of rights restoration that has mired SB-7066's implementation in an "administrative nightmare." Doc. 207 at 43-44. While there is ample evidence that including LFOs has created enormous administrative costs, the Secretary put forth *no* evidence demonstrating any purported burden of an inability to pay mechanism.

Nothing in the preliminary injunction suggests the creation of a new "vast bureaucratic system." Defs. Br. at 30. Instead, the district court pointed to existing mechanisms that could resolve questions related to inability to pay. *See* Doc. 207 at

38. Moreover, there is no reason to believe that voters entitled to this relief will all need "individualized determinations." Defs. Br. at 30. Florida's voter registration system relies on voter affirmation as the primary means of establishing eligibility. Fla. Stat. § 97.053(5). And, there are numerous available benchmarks that the Secretary might employ to narrow the scope of cases that might require individualized inquiry. *See* Doc. 239 at 34:18-35:19. For those who do require individual determinations, Florida already grants a hearing to any registrant credibly identified as potentially ineligible. Fla. Stat. § 98.075(7)(a).

Finally, unlike the welfare benefits case cited by Secretary Lee, Plaintiffs' claim does not raise a question of whether "case by case adjudication" is superior to "[g]eneral rules" but rather whether the State must have *any* inability to pay mechanism. Defs. Br. at 30-31; *Califano v. Boles,* 443 U.S. 282, 284-85 (1979). Having made no effort to identify a system for implementing the district court's injunction and presented no evidence of actual costs, Secretary Lee cannot ask this Court to deny Plaintiffs' wealth discrimination claim based on presumptions.

C. Secretary Lee's Attempts to Distinguish the *Griffin-Harper-Bearden* Line of Cases Fail.

1. The Constitutionality of Felony Disenfranchisement Does Not Excuse Restricting Access to the Vote on Ability to Pay.

Secretary Lee argues that because people with felony convictions can lawfully be denied the right to vote under *Richardson*, *Harper* and *M.L.B.*'s rule that affluence cannot be made an electoral standard does not apply. Defs. Br. at 22-23. Not so.

First, Secretary Lee misunderstands the nature of fundamental rights in constitutional jurisprudence. Although fundamental rights can certainly be denied—in accordance with due process—rights do not change their fundamental status from person to person. The right to vote is no less important to a person with a conviction despite that person's lawful disenfranchisement. Although a person with a conviction can be lawfully denied the right to physical liberty, that loss of liberty cannot be extended because of inability to pay. *See, e.g., Williams*, 399 U.S. 235. Just as the right to physical liberty does not lose its fundamental status simply because a person can lawfully be denied that right as a result of conviction, neither does the right to vote.

Second, nothing in *Richardson* suggests that when citizens face electoral standards *other than* the fact of their criminal convictions, constitutional standards do not apply. *Richardson* simply held that criminal convictions are a permissible factor, like residency or citizenship, for states to consider in establishing

qualifications for the franchise. 418 U.S. at 53 (quoting *Lassiter v. Northhampton Cty. Bd. of Elections*, 360 U.S. 45, 51 (1959) ("Residence requirements, age, previous criminal record . . . are . . . factors which a State may take into consideration in determining the qualifications of voters." (internal quotation marks omitted))). It did not, as Secretary Lee contends, withdraw an entire class of people from any constitutional protection in their access to the right to vote.

Richardson and its progeny make clear that the *manner* in which states structure their felony disenfranchisement schemes must conform with the Fourteenth Amendment. In *Richardson,* the Court upheld felony disenfranchisement as a general matter but remanded the question of whether California's system violated the Equal Protection Clause due to lack of uniformity and arbitrariness. 418 U.S. at 56. Subsequent precedent reaffirms this principle. *See Hunter v. Underwood,* 471 U.S. 222 (1985); *Shepherd v. Trevino*, 575 F.2d 1110, 1114-15 (5th Cir. 1978)[15]; *Owens v. Barnes,* 711 F.2d 25, 27 (3d Cir. 1983); *Hobson v. Pow*, 434 F. Supp. 362, 366-67 (N.D. Ala. 1977).

Thus, while Florida can lawfully disenfranchise people with convictions, its electoral standards for rights restoration must comply with the Constitution. And

[15] *Shepherd* was decided before the split of the Fifth Circuit and is therefore binding precedent.

wealth is not a permissible electoral standard. Indeed, "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Harper*, 383 U.S. at 668. The district court's hypothetical illustrates the point:

> Suppose a state adopted a statute automatically restoring the right to vote for felons with a net worth of $100,000 or more but not for other felons. Would anyone contend this was constitutional? One hopes not. An official who adopts a constitutional theory that would approve such a statute needs a new constitutional theory.

Doc. 207 at 33-34. It appears that Secretary Lee needs a new constitutional theory.

2. Secretary Lee Fails to Distinguish the Supreme Court's Wealth Discrimination Cases.

Secretary Lee's argument that the *Griffin-Bearden* line of cases does not apply because *Bearden* (1) is incarceration-specific and (2) involves a fundamental right similarly fails. Defs. Br. at 23-25.

First, the *Griffin-Bearden* line of cases is *not* incarceration-specific. In *Mayer v. City of Chicago,* the Supreme Court explicitly rejected such a limitation and applied the principle to cases without any risk of incarceration. 404 U.S. at 196-97. Since then, the Court has applied *Griffin* and its progeny in a series of cases not involving incarceration. *See M.L.B.*, 519 U.S. at 111 ("*Griffin*'s principle has not been confined to cases in which imprisonment is at stake[.]"); *see also Boddie*, 401 U.S. at 382; *Zablocki*, 434 U.S. at 402. Moreover, the test set out by *Bearden*—the first factor of which is "the nature of the individual interest affected," 461 U.S. at

666-67—would be nonsensical if *Bearden* only applied to incarceration. Finally, this Court in *Walker* specifically rejected reasoning that would limit the wealth discrimination cases to incarceration. 901 F.3d at 1264 (rejecting the dissent's proposed application of heightened scrutiny only to "access to judicial processes in [criminal] cases").

Secretary Lee's other attempt to distinguish *Bearden* only demonstrates her overarching logical flaw. Secretary Lee argues that *Bearden* is different because "*Bearden* implicated a fundamental right—the right to be free from physical restraint and punishment" and "Plaintiffs here do not have a fundamental right to have their right to vote restored." Defs. Br. at 24-25. This is nonsense. *Bearden* is about denial of probation—a statutory benefit offered to those whose fundamental right to liberty has been lawfully constrained. People sentenced to prison for a criminal conviction have no right to probation. *See Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935) ("Probation or suspension of sentence comes as an act of grace" and has no "basis in the Constitution, apart from any statute."). In both *Bearden* and this case, the plaintiffs have lawfully been stripped of the fundamental right at issue—liberty in *Bearden* and voting here. The question is whether restoration of that right can hinge on ability to pay. It cannot.

In light of controlling precedent, Secretary Lee's reliance on an out-of-circuit case, *Johnson v. Bredesen,* 624 F.3d 742 (6th Cir. 2010), and a Washington state

court case, *Madison v. State,* 163 P.3d 757 (Wash. 2007), is unavailing.[16] Notably, both cases were split decisions and, as the district court noted, in both cases, "the dissent had the better of it." Doc. 207 at 35. Other federal courts also have rejected the reasoning in these cases. *See Bynum v. Conn. Comm'n on Forfeited Rights,* 410 F.2d 173, 176 (2d Cir. 1969) (applying *Harper* in the voting rights restoration context); *Thompson v. Alabama*, 293 F. Supp. 3d 1313, 1332 (M.D. Ala. 2017) (denying Defendants' motion to dismiss an identical inability to pay claim).

Among other errors, *Bredesen* mirrors Secretary Lee's mistake in assuming that *Bearden* involved a fundamental right but that voting rights restoration does not. 624 F.3d at 748-49. Although there is no fundamental right to probation or rights restoration, there are fundamental rights to liberty and voting. And where a statutory scheme implicates such rights, they cannot be denied based on inability to pay. Likewise, *Madison* made the error of assuming that *Richardson* insulates felony disenfranchisement from any constitutional review. 163 P.3d at 768. *See supra* at 32-33.

Finally, Secretary Lee relies on inapplicable purposeful discrimination cases to argue that rational basis applies.[17] Defs. Br. at 25-27. The Supreme Court has

[16] Any reliance on *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010), is similarly inapposite. *Harvey* specifically reserved the question of the constitutionality of an LFO requirement as applied to individuals unable to pay. *Id.* at 1079.

[17] While rational basis is not appropriate, SB-7066 fails rational basis because wealth in voting is always a "capricious or irrelevant factor," *Harper*, 383 U.S. at 668, and

repeatedly rejected attempts to "pigeonhole" wealth-discrimination claims into this traditional rubric. *Bearden,* 461 U.S. at 666. This is because the "[l]aw addresses itself to actualities," *Griffin,* 351 U.S. at 23, and "a law nondiscriminatory on its face may be grossly discriminatory in its operation," *id.* at 17 n.11. It is the "operative effect" of the statute that matters. *Williams*, 399 U.S. at 242.

Having failed to come to grips with the *Griffin-Harper-Bearden* line of cases, Secretary Lee suggests in the alternative that the entire line should be overturned. Defs. Br. at 26 n.4. In essence, Secretary Lee argues—in the year 2020—that Florida should not only be able to deny citizens the right to vote based on inability to pay, but also to remand those citizens to prison.[18] The articulation of that proposition suffices to defeat it.

Secretary Lee has offered no comprehensible account of *Griffin-Harper-Bearden* that excludes SB-7066 from its scope. This Court cannot, as Secretary Lee

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SB-7066 as applied to those unable to pay serves no government interest. *See supra* at 28-31. Rational basis, particularly in the elections context, is not toothless. *See, e.g., Fulani v. Krivanek*, 973 F.2d 1539, 1547 (11th Cir. 1992) ("[A] party's ability to pay a verification fee is not rationally related to whether that party has a modicum of support."). Moreover, Secretary Lee herself implies that SB-7066 would be unconstitutional if there were "evidence that felons unable to pay their outstanding [LFOs] vastly outnumbered those able to pay." Defs. Br. at 29-30. Such evidence *was* presented below. Doc. 207 at 18.

[18] Secretary Lee relies on *Washington v. Davis*, 426 U.S. 229 (1976), as the basis for overturning this line of cases, many of which post-date *Washington*. The Supreme Court has already rejected this argument. *M.L.B.*, 519 U.S. at 125-127.

urges, merely treat each of these cases as *sui generis* but rather must read them together. Doing so compels the result below.

II. The Twenty-Fourth Amendment Is Not at Issue in this Appeal.

Secretary Lee devotes a substantial portion of her briefing to Plaintiffs' Twenty-Fourth Amendment claims; an issue outside the scope of her appeal and this Court's jurisdiction at this stage. The district court did not issue a ruling on the question of whether SB-7066's LFO requirements—in whole or in part—impose unconstitutional poll taxes. Defs. Br. at 33; *see also* Doc. 207 at 43. The Secretary does not have standing to raise the poll tax issue in this appeal. Jurisdictional Br. at 13-16. This Court should decline the Secretary's invitation to rule on the issue in the first instance.

First, pursuant to 28 U.S.C. § 1292(a)(1), the scope of appellate jurisdiction over a preliminary injunction is "limited to matters directly related to the [decision on] injunctive relief." *Kaimowitz v. Orlando*, 122 F.3d 41, 43 (11th Cir. 1997), *opinion amended on reh'g*, 131 F.3d 950 (11th Cir. 1997); *see also Callaway v. Block*, 763 F.2d 1283, 1287 n.6 (11th Cir. 1985) ("[W]hen an appeal is taken from . . . a preliminary injunction, the reviewing court will go no further into the merits than is necessary . . . ."). The district court's preliminary injunction rests on the Fourteenth Amendment wealth-discrimination claim, not the Twenty-Fourth Amendment.

Nonetheless, Secretary Lee suggests that the Twenty-Fourth Amendment may be relevant to this Court's review of the preliminary injunction because "Plaintiffs may raise it as an alternate ground for affirmance." Defs. Br. at 33. This argument can be expeditiously dismissed. As Secretary Lee was aware, Plaintiffs are not raising the Twenty-Fourth Amendment as an alternative ground for affirmance. *See, e.g.*, Jurisdictional Br. at 13-16. Nor could they. The preliminary injunction applies *only* to individuals who can show an inability to pay their outstanding LFOs: a criterion irrelevant to the Twenty-Fourth Amendment. *See Harman v. Forssenius*, 380 U.S. 528, 542 (1965) ("[T]he poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed."). Thus, a favorable ruling by this Court on Plaintiffs' Twenty-Fourth Amendment claim would not result in an affirmance of the injunction below but would instead require an entirely different injunction.

Thus, this Court could not affirm—in whole or in part—the district court's preliminary injunction on the basis of the Twenty-Fourth Amendment. This Court lacks jurisdiction over the Twenty-Fourth Amendment issue and the Secretary may not use this interlocutory appeal to seek "consideration of the merits" beyond what is "necessary to review the injunction." *Gould v. Control Laser Corp.*, 650 F.2d 617,

621 n.7 (5th Cir. 1981); *see also Variable Annuity Life Ins. Co. v. Laferrera*, 680 F. App'x 880, 886 (11th Cir. 2017).[19]

Moreover, "it is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). The district court's brief remarks on this issue hardly constitute a reviewable decision. The question of whether LFOs fall within the scope of an "other tax" under the Twenty-Fourth Amendment has not been decided by this Court or the Supreme Court and Plaintiffs intend to develop the record on their Twenty-Fourth Amendment claims at trial. *Cf. id.* at 121 ("The issue [sic] resolved by the Court of Appeals have never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue [in the first instance on appeal]."). This will include evidence regarding whether these LFOs are "taxes." Doc. 207 at 41-42 (noting the "functional approach" for determining whether an exactment constitutes a tax). At such time, the district court will be able to issue detailed findings of fact and conclusions of law on this issue; only then will it be ripe for this Court's review.

[19] Parties must not be permitted to "parlay" limited interlocutory appellate jurisdiction into "multi-issue interlocutory appeal tickets." *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 50 (1995).

III. SB-7066 Violates the Twenty-Fourth Amendment.

If the Court reaches the Secretary's Twenty-Fourth Amendment arguments, it should reject them. The Twenty-Fourth Amendment prohibits states from "den[ying] or abridg[ing]" the right to vote "by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV, § 1. SB-7066's LFO requirement will "den[y] or abridge[]" the right to vote for hundreds of thousands of Floridians. Nonetheless, Secretary Lee contends that SB-7066 does not impose a "poll tax" because it "does not deny or abridge any rights; it only restores them." Defs. Br. at 34-35. (quoting *Bredesen*, 624 F.3d at 751). Again, Secretary Lee misunderstands the constitutional principle. The Twenty-Fourth Amendment does not dictate who must be eligible to vote in the first instance, but rather flatly prohibits financial conditions on access to the right to vote. Having chosen to extend the right to vote to people with past convictions, Florida cannot do so in a manner that violates the Constitution's prohibitions on how the right to vote may be allocated.[20] *See Harper*, 383 U.S. at 665; *see also Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

The Twenty-Fourth Amendment's expansive language is intended to "nullif[y] sophisticated as well as simple minded modes" of taxing prospective

[20] For this reason, a law that prohibited 17-year-olds with outstanding parking tickets from voting would run afoul of the Twenty-Fourth Amendment, though it complies with the Twenty-Sixth. Likewise, a law that re-enfranchised only men with past convictions would violate the Nineteenth Amendment and a law that re-enfranchised only those above the age of forty would violate the Twenty-Sixth.

voters and extends to "equivalent or milder substitute[s]" to a poll tax. *Harman*, 380 U.S. at 540–41. The inclusion of the phrase "other tax" in addition to poll tax demonstrates that the Twenty-Fourth Amendment reaches beyond formal poll taxes to any state charge that must be paid in exchange for access to the ballot. At issue, therefore, is whether LFOs share "the essential feature of any tax: [the production of] at least some revenue for the Government." *Sebelius*, 567 U.S. at 564; *see also United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 606 (1975) (indicating that the "standard definition of a tax" is an "enforced contribution to provide for the support of government"). They do.

The revenue collected from LFOs imposed on people charged with felony crimes is primarily used to fund Florida's criminal justice system. *See* Fla. Const. Art. V, § 14; *Crist v. Ervin*, 56 So.3d 745, 752 (Fla. 2010) ("[C]ourt-related functions of the clerks' offices are to be funded entirely from filing fees and service charges."); *see also, e.g.*, Fla. Stat. §§ 142.01; 775.083(1) (directing criminal fines to be paid into the fine and forfeiture fund). Although fines may serve a punitive purpose,[21] they are also used to generate revenue for the state. Secretary Lee has acknowledged

[21] Although punitive intent may be significant in determining whether an assessment is functionally a tax, *see Sebelius*, 41 U.S. at 567-68, that is so only where legality of the assessment itself depends on its function, as it does with respect to Congress's taxing power. The same difference "may be immaterial" as here, "[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).

that the Florida's interest in conditioning rights restoration on payment of LFOs is, at least in part, remunerative. *See* Doc. 132 at 7; *see also id.* at 31; Sec'y. Br. at 10-13, *Adv. Op. to Gov. Re: Implementation of Amend. 4*, No. SC19-1341 (Fla. Sept. 19. 2019). Further, many mandatory fees and costs lack any punitive purpose, 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. § 27.52(1)(b) (requiring any criminal defendant seeking a public defender to pay an application fee even if the person is acquitted). Because the LFOs imposed under Florida law are used to generate revenue for the state, they are, functionally, taxes.

Much as she may want to, Secretary Lee cannot write the phrase "other tax" out of the Constitution. By conditioning rights restoration on payment of LFOs, SB-7066 violates the Twenty-Fourth Amendment.

IV. The District Court's Injunction Is Proper Because the Ruling Does Not Nullify Amendment 4 and the Remaining Factors Are Satisfied.

A. The District Court's Injunction is Proper Because the Opinion Does Not Nullify Amendment 4.

Secretary Lee argues that the district court's ruling nullifies Amendment 4 and thus Plaintiffs are not entitled to the relief ordered. This argument is unfounded.

1. As-Applied Claims Do Not Trigger a Severability Analysis.

Secretary Lee does not cite any legal authority to support her argument that the district court's as-applied constitutional ruling triggers a severability analysis. Indeed, the Secretary's counsel admitted that he "scoured" existing case law and could not find a case to support this position. Doc. 239 at 73:24-74:2.

As demonstrated by the wealth discrimination cases relied upon here, courts routinely grant relief on as-applied claims without engaging in any severability analysis. In *M.L.B.*, the Supreme Court did not engage in any analysis of whether the state's "interest in offsetting the costs of its court system," if unconstitutional as applied to those who cannot pay, was severable from its interest in providing the benefit of an appeal or in collecting record fees from those able to pay. 519 U.S. at 122. Nor did the Court engage in a severability analysis in any of the cases in the *Griffin-Bearden* line. *See, e.g.*, *Griffin,* 351 U.S. 12; *Mayer*, 404 U.S. 189; *Boddie*, 401 U.S. 371; *Williams*, 399 U.S. 235; *Bearden*, 461 U.S. 660. Further, the Court's practice of deciding as-applied challenges without reference to severability is consistent across civil rights jurisprudence.[22]

[22] *See*, e.g.*, Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (finding that states "may not constitutionally apply [] eligibility provisions" to deny a benefit offered by the state to a person solely because of their faith, without analyzing whether the expansion of eligibility for that benefit contradicted the state's intent in offering it); *Welsh v. U.S.*, 398 U.S. 333, 344 (1970) (extending the conscientious objector exemption to individuals who are not religious but whose "consciences . . . would give them no rest or peace if they allowed themselves to become a part of an

Only Justice Thomas has suggested that a severability analysis is appropriate in as-applied cases and that position lacks support. *See U.S. v. Booker*, 543 U.S. 220, 322 (2005) (Thomas, J., dissenting). Indeed, Justice Thomas acknowledged the Court's practice of "dispos[ing] of as-applied challenges to a statute by simply invalidating particular applications of the statute, without saying anything at all about severability." *Id.*; *see also id.* at 281 n.6 (Stevens, J., dissenting) (rejecting outright any contention that courts "must engage in a severability analysis if a statute is unconstitutional only in some of its applications").[23] And like Secretary Lee, Justice Thomas was unable to point to any case in which the Court engaged in a severability analysis in the as-applied context.[24] The cases he relied on stand only

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instrument of war" without analyzing whether such extension nullified Congressional intent in creating the exemption); *U.S. v. Grace*, 461 U.S. 171 (1983) (striking down restrictions on First Amendment activity on the grounds of the Supreme Court as applied to the public sidewalks surrounding the Court, without any consideration of whether the application to public sidewalks was severable from the rest of the statute).

[23] In *Booker*, the Court found certain provisions of the federal Sentencing Guidelines unconstitutional on their face and engaged in a severability analysis to determine whether the remainder of the Guidelines could stand absent the unconstitutional provisions. 543 U.S. at 245-58. Thus, the question of whether severability applies in an as-applied challenge was not addressed in the majority opinion. In separate dissents, however, Justice Stevens and Justice Thomas each found that an as-applied remedy was more appropriate, and consequently discussed whether courts must undertake a severability analysis when ruling on as-applied claims. *See id.* at 280-84, 320-23.

[24] In *Tennessee v. Garner*, the Court held a statute authorizing police to use all means necessary to effect the arrest of a fleeing or resisting suspect unconstitutional as applied in situations other than when necessary to prevent escape of a suspect who

for the "normal rule" that where a statute is unconstitutional only in certain applications, "partial, rather than facial, invalidation is the required course," such that a "statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett v. Spokane*, 472 U.S. 491, 504 (1985).

The district court had no obligation to conduct a severability analysis before enjoining SB-7066 as applied to Plaintiffs.

2. The Injunction Does Not Implicate the Constitutionality of Amendment 4, Even as Interpreted by Secretary Lee.

Even assuming that severability is appropriate in the as-applied context, a severability analysis is unnecessary here because the district court's order does not implicate the constitutionality of any provision of Amendment 4, even as interpreted by Secretary Lee. The district court did not find that defining the phrase "all terms of sentence including probation and parole" to include LFOs for the purposes of rights restoration violates the Constitution. Nor did it find that Amendment 4's requirement that individuals "complete" their LFOs as a condition of rights restoration violates the Constitution. The Court's order merely states that Florida

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poses a significant threat of death or serious physical injury. 471 U.S. 1, 3 (1985). The court did not engage in any severability analysis, but rather held the statute was unconstitutional only in certain applications. *Id.* at 11-12. In *Brockett v. Spokane Arcades, Inc.*, the Court found that rather than striking a statute down as facially unconstitutional, the lower court could have adopted a more limited remedy *either* by enjoining enforcement of the statute as applied to the constitutionally protected conduct *or* by striking the overbroad provision, which it found severable. 472 U.S. 491, 505-507 (1985).

cannot constitutionally deny rights restoration to individuals solely because they are genuinely unable to *pay* their LFOs. Doc. 207 at 38.

Secretary Lee has already conceded that Amendment 4 does not necessarily require *payment* of LFOs for "completion" of a criminal sentence. *See* Doc. 207 at 38-39. This position is consistent with that of the Legislature and the Governor in interpreting Amendment 4. *See* Doc. 121 at 19 n.12 (citing Senate Hr'g Tr. at 6:35:50-6:38:38, May 2, 2019, colloquy between sponsors of SB-7066 acknowledging that defining "completion" to mean conversion of LFOs to civil lien would satisfy Amendment 4); *see also* Oral Argument at 16:57-17:24, *Advisory Op. Re. Implementation of Amend. 4*, SC19-1341 (Fla. Nov. 6, 2019), https://www.floridasupremecourt.org/Oral-Arguments/Videos-of-Oral-Argument-Broadcasts (counsel for the Governor clarifying that the definition of "completion" is not at issue in interpreting Amendment 4's mandate with respect to LFOs). Thus, nothing in the district court's order prevents Secretary Lee from complying with the requirements of both the Florida and United States Constitutions. The opinion merely invalidates SB-7066 to the extent it denies the right to vote to individuals who cannot *pay* their LFOs. The State has acknowledged that "completion" could mean something other than payment of LFOs but failed to define it in a manner that protects those genuinely unable to pay. *See* Fla. Stat. § 98.0751(2)(e). The district court's order leaves room for Florida to adopt any definition of "completion" that

will ensure its citizens are not denied the right to vote solely because they are unable to pay their LFOs.

3. Even Assuming Full Payment of LFOs Is Mandated by Amendment 4, this Non-Textual Requirement Is Severable.[25]

Even if severability were an appropriate consideration, its requirements would be met here. "[T]he purpose underlying severability [is] to preserve the constitutionality of enactments where it is possible to do so." *Ray v. Mortham*, 742 So. 2d 1276, 1281 (Fla. 1999). With respect to citizen-initiated constitutional amendments, courts "must . . . uphold [an] amendment if, after striking the invalid provisions, the purpose of the amendment can still be accomplished." *Id.* at 1281.

Under Florida law, unconstitutional provisions will be severed when the following factors are met:

> (1) they can be separated from the remaining valid provisions[;] (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void[;] (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other[;] and

[25] *Raysor* Plaintiffs dispute that a severability analysis is either appropriate or necessary under the district court's order. Should the Court disagree, the proper procedure would be to remand to the district court to address the issue in the first instance, rather than to rule on whether severability precludes the district court's injunction for the first time on appeal. *See supra* at 38-40. Nonetheless, *Raysor* Plaintiffs address the merits of the issue here, so as not to waive the argument. Because severability is only implicated if LFOs are included in the phrase "all terms of sentence including probation and parole," *Raysor* Plaintiffs therefore assume, for purposes of this argument, that the Florida Supreme Court will adopt that definition.

> (4) an act complete in itself remains after the invalid provisions are stricken.

Wollschlaeger v. Governor, 848 F.3d 1293, 1318 (11th Cir. 2017) (quoting *State v. Catalano*, 104 So. 3d 1069, 1080 (Fla. 2012)). "[T]he key determination is whether the overall legislative intent is still accomplished without the invalid provisions." *Catalano*, 104 So. 3d at 1080-81. Thus, the "key determination" here is whether Floridians' overall purpose in amending Article VI § 4 will be furthered even absent an LFO requirement read into the text. *Id.* It will.

Amendment 4 added two provisions to the Florida Constitution. Taken together, the two provisions ended permanent disenfranchisement for all individuals convicted of crimes other than murder or a felony sexual offense by automatically restoring the right to vote upon completion of "all terms of sentence including parole or probation." Doc. 152-96. Secretary Lee not only argues that voters intended to include payment of LFOs as a condition of rights restoration under Amendment 4, but then also argues *ipse dixit* that voters' *overall* purpose was to deny rights restoration to individuals unless they are able to pay off their LFOs. This argument fails for two reasons.

First, Secretary Lee's analysis does not take into account the Amendment as a whole, but rests on one possible interpretation of one single phrase in one of the two subsections voters adopted. "Whether a [provision] is severable is determined by 'its relation to the overall legislative intent of the [enactment] of which it is part,

and whether the [enactment], less the invalid provisions, can still accomplish this intent.'" *Coral Springs Street Sys. v. City of Sunrise*, 371 F.3d 1320, 1347 (11th Cir. 2004) (quoting *Martinez v. Scanlan*, 582 So.2d 1167, 1173 (Fla. 1991)). Read as a whole, the overall purpose of the Amendment is clear: voters sought to end permanent disenfranchisement for the majority of Floridians with past convictions. Before Amendment 4, every Floridian with a past felony conviction was permanently disenfranchised, subject to the Governor's unlimited discretion. Fla. R. Exec. Clemency 4. After Amendment 4, only those convicted of murder or a felony sexual offense are subject to permanent disenfranchisement. Fla. Const. art. VI, § 4.

Severability is not precluded simply because it is "impossible to be *certain* that the voters would have adopted the amendment had it not contained [the challenged] provisions." *Ray*, 742 So. 2d at 1283. Where the remainder of an enactment continues to serve a sufficiently "compelling purpose," courts may infer that voters would still have approved the amendment absent the excised provision. *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991). Ending permanent disenfranchisement for the majority of Floridians with past convictions and re-enfranchising over a million Floridians is a sufficiently "compelling purpose" to infer that Floridians would have approved restoration even absent an LFO requirement. *Id.*

Second, Secretary Lee must do more than merely "cast doubt on whether the amendment would have passed without the [challenged] provisions." *Ray*, 742 So. 2d at 1281. Here, even assuming voters intended to include an LFO requirement, that does not establish they would not have enacted Amendment 4 *without* such a provision. If the mere inclusion of a particular provision were sufficient to demonstrate its inseverability, there would be no need for a severability doctrine. The invalidation of any provision included in a larger whole would invalidate that whole.[26] The Secretary must offer more than "conjecture and speculation" that voters would not have enacted Amendment 4 absent an LFO requirement. *Id.* at 1283. She has not done so here.

The remaining factors also support severability. Any implicit LFO requirement can be separated from the remaining provisions because it operates independently of the other provisions to govern a select universe of individuals. *See Wollschlaeger*, 848 F.3d at 1317-18. Article VI § 4 will continue to be "complete in itself." *Id*. It is not rendered "nonsensical," nor would severance "otherwise chang[e] its essential meaning beyond what is necessary to cure the constitutional defect." *Schmitt*, 590 So. 2d at 415.

[26] Such an argument is even more nonsensical here, where the provision Secretary Lee argues was so integral to voters' overall purpose is left to implication and inference, rather than spelled out in the text.

B. Plaintiffs Face Irreparable Harm and the Public Interest and Balance of the Equities Weigh Heavily in Plaintiffs' Favor.

The district court did not abuse its discretion in holding that the remaining factors all weigh in favor of Plaintiffs. Irreparable injury is presumed when a restriction on the right to vote is at issue. *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1223 (N.D. Fla. 2018) (quoting *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)). Once the election passes, "there can be no do-over and no redress." *Id.* (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)); *Madera v. Detzner*, 325 F. Supp. 3d 1269, 1282 (N.D. Fla. 2018) (same); Doc. 207 at 51 ("When an eligible citizen misses an opportunity to vote, the opportunity is gone forever; the vote cannot later be cast.").

The balance of the equities and public interest likewise fall in favor of ensuring that Plaintiffs are not deprived of the right to vote because of the size of their pocketbooks. *LWVF v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) ("The vindication of constitutional rights and the enforcement of a federal statute serve the public interest almost by definition."). The public interest "favors permitting as many qualified voters to vote as possible," *Obama for Ameria*, 697 F.3d at 437, so that every eligible voter "can exercise their constitutional right to vote," *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016).

Secretary Lee's arguments to the contrary rest on her inaccurate view of the merits. *See* Defs. Br. at 47-48 (arguing lack of irreparable injury because Plaintiffs are not entitled to the right to vote); *id.* at 51 (arguing that the balance of equities favors Defendants because Plaintiffs are not entitled to the right to vote); *id.* at 52 (arguing that the public interest favors Defendants because Plaintiffs are not entitled to the right to vote).

Absent this bootstrapping, Secretary Lee cannot argue that the district court abused its discretion in holding that the remaining factors favor Plaintiffs. Even if the district court's injunction imposes some administrative burden on Secretary Lee, requiring the Secretary to administer elections in a constitutional manner cannot tip the balance in the Secretary's favor.[27] *Fla. Democratic Party v. Detzner*, Case No. 4:16-cv-607, 2016 WL 6090943, at *8 (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").

[27] Secretary Lee's complaint that the district court did not delineate the precise "ability to pay" standard rings hollow. Defs. Br. at 50, 52. That the district court gave the Secretary *more* flexibility to shape the remedy does not burden the Secretary. It allows her the discretion to craft a procedure that minimizes the burden while complying with the Constitution.

* * *

Although Florida was not required to re-enfranchise people with convictions, "once [it] affords that right . . . [it] may not bolt the door to equal justice." *M.L.B.*, 519 U.S. at 110.

CONCLUSION

For the foregoing reasons, the district court's order granting a preliminary injunction should be affirmed.

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Respectfully submitted,

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Dated: January 10, 2020

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

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