No. 20-12003

In the United States Court of Appeals for the Eleventh Circuit

KELVIN LEON JONES, ET AL.,

Plaintiffs–Appellees,

v.

RON DESANTIS, ET AL.,

Defendants–Appellants.

EN BANC OPENING BRIEF OF DEFENDANTS-APPELLANTS

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
NO. 4:19-CV-300-RH-MJ

CHARLES J. COOPER
PETER A. PATTERSON
STEVEN J. LINDSAY
SHELBY L. BAIRD
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, DC 20036
Telephone: (202) 220-9660
Fax: (202) 220-9601
ccooper@cooperkirk.com
ppatterson@cooperkirk.com
slindsay@cooperkirk.com
sbaird@cooperkirk.com

JOE W. JACQUOT
NICHOLAS A. PRIMROSE
JOSHUA PRATT
EXECUTIVE OFFICE OF THE GOVERNOR
400 S. Monroe St., PL-5
Tallahassee, FL 32399
Telephone: (850) 717-9310
Fax: (850) 488-9810
joe.jacquot
@eog.myflorida.com
nicholas.primrose
@eog.myflorida.com
joshua.pratt
@eog.myflorida.com

BRADLEY R. MCVAY
ASHLEY E. DAVIS
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building, Suite 100
500 South Bronough Street
Tallahassee, FL 32399
Phone: (850) 245-6536
Fax: (850) 245-6127
brad.mcvay
@dos.myflorida.com
ashley.davis
@dos.myflorida.com

Counsel for Defendants-Appellants

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Defendants–Appellants certify that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

1. Abudu, Nancy G., *Attorney for Plaintiffs/Appellees*
2. Aden, Leah C., *Attorney for Plaintiffs/Appellees*
3. Adkins, Mary E., *Witness*
4. American Civil Liberties Union Foundation, *Attorneys for Plaintiffs/Appellees*
5. American Civil Liberties Union of Florida, *Attorneys for Plaintiffs/Appellees*
6. Antonacci, Peter, *Defendant*
7. Arrington, Mary Jane, *Witness*
8. Atkinson, Daryl V., *Attorney for Third Party*
9. Awan, Naila S., *Attorney for Third Party*
10. Bains, Chiraag, *Attorney for Third Party*
11. Baird, Shelby L., *Attorney for Defendant/Appellant*
12. Bakke, Douglas, *Witness*
13. Barber, Michael, *Witness*
14. Barton, Kim A., *Defendant*

15. Becker, Sue, *Counsel for Amicus Curiae*

16. Bennett, Michael, *Defendant/Witness*

17. Bentley, Morgan, *Defendant*

18. Bowie, Blair, *Attorney for Plaintiffs/Appellees*

19. Brazil and Dunn, *Attorneys for Plaintiffs/Appellees*

20. Brennan Center for Justice at NYU School of Law, *Attorneys for Plaintiffs/Appellees*

21. Brnovich, Mark, Attorney General of Arizona, *Counsel for Amicus Curiae*

22. Brown, S. Denay, *Attorney for Defendant*

23. Brown, Toshia, *Witness*

24. Bryant, Curtis, *Plaintiff/Appellee/Witness*

25. Burch, Traci, *Witness*

26. Cameron, Daniel, Attorney General of Kentucky, *Counsel for Amicus Curiae*

27. Campaign Legal Center, *Attorney for Plaintiffs/Appellees*

28. Carpenter, Whitley, *Attorney for Third Party*

29. Carr, Christopher M., Attorney General of Georgia, *Counsel for Amicus Curiae*

30. Cesar, Geena M., *Attorney for Defendant*

31. Commonwealth of Kentucky, *Amicus Curiae*

32. Consovoy, William S., *Counsel for Amicus Curiae*

33. Cooper & Kirk, PLLC, *Attorneys for Defendant/Appellant*

34. Cooper, Charles J., *Attorney for Defendant/Appellant*

35. Cowles, Bill, *Defendant*

36. Curtis, Kelsey J., *Counsel for Amicus Curiae*

37. Cusick, John S., *Attorney for Plaintiffs/Appellees*

38. Danahy, Molly E., *Attorney for Plaintiffs/Appellees*

39. Danjuma, R. Orion, *Attorney for Plaintiffs/Appellees*

40. Davis, Ashley E., *Attorney for Defendant/Appellant*

41. Dēmos, *Attorneys for Third Party*

42. DeSantis, Ron, *Defendant/Appellant*

43. Diaz, Jonathan, *Attorney for Plaintiffs/Appellees*

44. Donovan, Todd, *Witness*

45. Dunn, Chad W., *Attorney for Plaintiffs/Appellees*

46. Earley, Mark, *Defendant*

47. Ebenstein, Julie A., *Attorney for Plaintiffs/Appellees*

48. Ellison, Marsha, *Witness*

49. Ernst, Colleen M., *Attorney for Defendant*

50. Fairbanks Messick, Misty S., *Counsel for Amicus Curiae*

51. Feizer, Craig Dennis, *Attorney for Defendant*

52. Florida Justice Institute, Inc., *Attorneys for Third Party*

53. Florida Rights Restoration Coalition, *Third Party-Amicus*

54. Florida State Conference of the NAACP, *Plaintiff/Appellee*

55. Forward Justice, *Attorneys for Third Party*

56. Gaber, Mark P., *Attorney for Plaintiffs/Appellees*

57. Geltzer, Joshua A., *Attorney for Amici Curiae*

58. Giller, David, *Attorney for Plaintiffs/Appellees*

59. Gordon-Marvin, Emerson, *Attorney for Third Party*

60. Gruver, Jeff, *Plaintiff/Appellee*

61. Hamilton, Jesse D., *Plaintiff/Appellee*

62. Hanson, Corbin F., *Attorney for Defendant*

63. Harris, Jeffrey M., *Counsel for Amicus Curiae*

64. Harrod, Rene D., *Attorney for Defendant*

65. Haughwout, Carey, *Witness*

66. Herron, Mark, *Attorney for Defendant*

67. Hinkle, Robert L., *District Court Judge*

68. Ho, Dale E., *Attorney for Plaintiffs/Appellees*

69. Hoffman, Lee, *Plaintiff/Appellee*

70. Hogan, Mike, *Defendant*

71. Holland & Knight, LLP, *Attorneys for Defendant*

72. Holmes, Jennifer, *Attorney for Plaintiffs/Appellees*

73. Ifill, Sherrilyn A., *Attorney for Plaintiffs/Appellees*

74. Ivey, Keith, *Plaintiff/Appellee*

75. Jacquot, Joseph W., *Attorney for Defendant/Appellant*

76. Jazil, Mohammad O., *Attorney for Defendant*

77. Jones, Kelvin Leon, *Plaintiff/Appellee*

78. Katzman, Adam, *Attorney for Defendant*

79. Klitzberg, Nathaniel, *Attorney for Defendant*

80. Kousser, J. Morgan, *Witness*

81. LaCour, Edmund G., Jr., *Counsel for Amicus Curiae*

82. Landry, Jeff, Attorney General of Louisiana, *Counsel for Amicus Curiae*

83. Lang, Danielle, *Attorney for Plaintiffs/Appellees*

84. Latimer, Craig, *Defendant*

85. League of Women Voters of Florida, *Plaintiff/Appellee*

86. Lee, Laurel M., *Defendant/Appellant*

87. Leicht, Karen, *Plaintiff/Appellee*

88. Lindsay, Steven J., *Attorney for Defendant/Appellant*

89. Marconnet, Amber, *Witness*

90. Marino, Anton, *Attorney for Plaintiffs/Appellees*

91. Marshall, Steve, Attorney General of Alabama, *Counsel for Amicus Curiae*

92. Martinez, Carlos J., *Witness*

93. Matthews, Maria, *Witness*

94. McCord, Mary B., *Attorney for Amici Curiae*

95. McCoy, Rosemary Osborne, *Plaintiff/Appellee/Witness*

96. McVay, Bradley R., *Attorney for Defendant/Appellant*

97. Meade, Desmond, *Witness*

98. Mendez, Luis, *Plaintiff/Appellee*

99. Meros, Jr., George M., *Attorney for Defendant*

100. Meyers, Andrew J., *Attorney for Defendant*

101. Midyette, Jimmy, *Attorney for Plaintiffs/Appellees*

102. Miller, Jermaine, *Plaintiff/Appellee*

103. Mitchell, Emory Marquis, *Plaintiff/Appellee*

104. Moody, Ashley, *Attorney for Defendant/Appellant*

105. Morales-Doyle, Sean, *Attorney for Plaintiffs/Appellees*

106. Moreland, Latoya, *Plaintiff/Appellee/Witness*

107. NAACP Legal Defense and Educational Fund, *Attorneys for Plaintiffs/Appellees*

108. Neily, Clark M. III, *Attorney for the Cato Institute (Amicus Curiae)*

109. Nelson, Janai S., *Attorney for Plaintiffs/Appellees*

110. Oats, Anthrone, *Witness*

111. Orange County Branch of the NAACP, *Plaintiff/Appellee*

112. Patterson, Peter A., *Attorney for Defendant/Appellant*

113. Paul Weiss Rifkind Wharton & Garrison LLP, *Attorneys for Plaintiffs/Appellees*

114. Paxton, Ken, Attorney General of Texas, *Counsel for Amicus Curiae*

115. Pérez, Myrna, *Attorneys for Plaintiffs/Appellees*

116. Perko, Gary V., *Attorney for Defendant*

117. Peterson, Doug, Attorney General of Nebraska, *Counsel for Amicus Curiae*

118. Phalen, Steven, *Plaintiff/Appellee*

119. Phillips, Kaylan L., *Counsel for Amicus Curiae*

120. Pratt, Joshua E., *Attorney for Defendant/Appellant*

121. Price, Tara R., *Attorney for Defendant*

122. Primrose, Nicholas A., *Attorney for Defendant/Appellant*

123. Raysor, Bonnie, *Plaintiff/Appellee*

124. Reingold, Dylan T., *Plaintiff/Appellee*

125. Reyes, Sean, Attorney General of Utah, *Counsel for Amicus Curiae*

126. Riddle, Betty, *Plaintiff/Appellee*

127. Rizer, Arthur L. III, *Attorney for the R Street Institute (Amicus Curiae)*

128. Rosenthal, Oren, *Attorney for Defendant*

129. Rutledge, Leslie, Attorney General of Arkansas, *Counsel for Amicus Curiae*

130. State of Alabama, *Amicus Curiae*

131. State of Arizona, *Amicus Curiae*

132. State of Arkansas, *Amicus Curiae*

133. State of Georgia, *Amicus Curiae*

134. State of Louisiana, *Amicus Curiae*

135. State of Nebraska, *Amicus Curiae*

136. State of South Carolina, *Amicus Curiae*

137. State of Texas, *Amicus Curiae*

138. State of Utah, *Amicus Curiae*

139. Scoon, Cecile M., *Witness*

140. Shannin, Nicholas, *Attorney for Defendant*

141. Sherrill, Diane, *Plaintiff/Appellee*

142. Short, Caren E., *Attorney for Plaintiffs/Appellees*

143. Signoracci, Pietro, *Attorney for Plaintiffs/Appellees*

144. Singleton, Sheila, *Plaintiff/Appellee/Witness*

145. Smith, Daniel A., *Witness*

146. Smith, Paul, *Attorney for Plaintiffs/Appellees*

147. Southern Poverty Law Center, *Attorneys for Plaintiffs/Appellees*

148. Spital, Samuel, *Attorney for Plaintiffs/Appellees*

149. Stanley, Blake, *Witness*

150. Steinberg, Michael A., *Attorney for Plaintiff/Appellee*

151. Swain, Robert, *Attorney for Defendant*

152. Swan, Leslie Rossway, *Defendant*

153. Sweren-Becker, Eliza, *Attorney for Plaintiffs/Appellees*

154. The Cato Institute, *Amicus Curiae*

155. The Public Interest Legal Foundation, *Amicus Curiae*

156. The R Street Institute, *Amicus Curiae*

157. Tilley, Daniel, *Attorney for Plaintiffs/Appellees*

158. Timmann, Carolyn, *Witness*

159. Todd, Stephen M., *Attorney for Defendant*

160. Topaz, Jonathan S., *Attorney for Plaintiffs/Appellees*

161. Trevisani, Dante, *Attorney for Third Party*

162. Turner, Ron, *Defendant*

163. Tyson, Clifford, *Plaintiff/Appellee*

164. Valdes, Michael B., *Attorney for Defendant*

165. Walker, Hannah L., *Witness*

166. Wayne, Seth, *Attorney for Amici Curiae*

167. Weiser, Wendy, *Attorney for Plaintiffs/Appellees*

168. Weinstein, Amanda, *Witness*

169. Wenger, Edward M., *Attorney for Defendants/Appellants*

170. White, Christina, *Defendant*

171. Wilson, Alan, Attorney General of South Carolina, *Counsel for Amicus Curiae*

172. Wrench, Kristopher, *Plaintiff/Appellee*

173. Wright, Raquel, *Plaintiff/Appellee*

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated: July 20, 2020

s/Charles J. Cooper
Charles J. Cooper
Counsel for Defendants-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutions, Statutes, and Rules

Other Authorities

INTRODUCTION

Plaintiffs, aided by the district court, have subjected the People of Florida to a grievous bait-and-switch. In the fall of 2018, Amendment 4 appeared on the ballot in Florida. The Amendment called for automatic reenfranchisement of convicted felons, subject to two crucial limitations: first, those felons convicted of murder or a felony sexual offense would not be eligible; and, second, all other felons would be eligible for restoration only "upon completion of *all terms of sentence*," a phrase whose plain meaning unambiguously includes financial terms of sentence, such as restitution, fines, and fees.

The requirement that felons pay their debt to society *in full* before being allowed to return to Florida's electorate was a critical feature of Amendment 4. Organizations, including the Brennan Center (counsel for Plaintiffs), had polling data indicating that achieving the 60% of the vote necessary to amend the Florida Constitution would be more difficult without it. *See* A748. And following Amendment 4's passage, the ACLU of Florida (counsel for Plaintiffs), the League of Women Voters of Florida (a Plaintiff), and other groups confirmed to the Secretary of State the obvious: that "*all* terms of sentence" in Amendment 4 includes

"financial obligations imposed as part of an individual's sentence." *See* A396 (emphasis added).

It thus came as a surprise when, following the adoption of Amendment 4, the same groups did a volte-face: they argued that Amendment 4 *does not include* a felon's financial terms of sentence, feigning that they no longer understood the meaning of the word "all." Worse still, after the enactment of SB-7066, legislation implementing Amendment 4, Plaintiffs challenged the measure, alleging that conditioning reenfranchisement on payment of financial terms of sentence *is unconstitutional*. And even worse, the district court has now agreed, holding in a final order (1) that felons who cannot immediately afford to pay off the financial terms of their sentences must immediately be reenfranchised under the Equal Protection Clause; and (2) that requiring felons to pay court fees and costs imposed as part of their criminal sentences as a condition for reenfranchisement is an unconstitutional "tax" on voting under the Twenty-Fourth Amendment. The district court also ordered a remedial process for Florida to implement its merits decision.

The district court's equal-protection decision, which followed a preliminary ruling by a panel of this Court, *Jones v. Governor of Florida*, 950 F.3d 795 (11th Cir. 2020) (per curiam) ("the *Jones* panel"), effectively repeals Amendment 4's "all terms of sentence" limitation on automatic felon reenfranchisement. Indeed, the class of felons unable immediately to pay the financial terms of their sentences in

full numbers in the hundreds of thousands. *See* A658. The district court's ruling effectively vetoes the judgment of Florida voters that felons must repay their debt to society in full before returning to the electorate.

The Constitution does not require this rewriting of Florida's felon reenfranchisement laws. Persons convicted of a felony in Florida are automatically disenfranchised *as part of the punishment for their crimes*. They are thus placed in the same shoes as, say, children and noncitizens. And both the *Jones* panel and the district court acknowledged that Florida is not required to reenfranchise felons *at all*. *See Jones*, 950 F.3d at 801–02; A1039–A1040; *see also Richardson v. Ramirez*, 418 U.S. 24 (1974). It therefore follows that Florida had broad leeway in exercising its discretion whether and on what terms to reenfranchise felons. *See, e.g.*, *Hayden v. Paterson*, 594 F.3d 150, 170 (2d Cir. 2010); *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983); *Shepherd v. Trevino*, 575 F.2d 1110, 1114–15 (5th Cir. 1978). This discretion includes, according to every other appellate court to address the issue, requiring completion of *all* terms of a felon's sentence, including financial terms, *see Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010) (O'Connor, J.), and this is true regardless of whether a felon can afford to pay, *see Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010); *Madison v. State*, 163 P.3d 757 (Wash. 2007) (en banc).

That felons forfeit their constitutional voting rights also undermines the district court's Twenty-Fourth Amendment decision, as costs and fees incurred as

part of a criminal sentence cannot be a "tax" on a non-existent right to vote. *See Johnson*, 624 F.3d at 751; *Harvey*, 605 F.3d at 1080; *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000) (per curiam). Furthermore, financial terms *of a criminal sentence* are not a tax of any kind.

The district court's ruling, and the *Jones* panel's as well, is expressly premised on the fundamental misunderstanding that Amendment 4's "all terms of sentence" condition on reenfranchisement is punitive: they cast it as a felon's punishment for being unable to pay his fines, restitution, or fees. But that could not be further from the truth. That is because felon disenfranchisement, again, *is a punishment for felony conviction*. Amendment 4 does not add *one day* to the period during which any felon is unable to vote. Rather, it provides an *avenue* for automatic restoration of felon voting rights in Florida, therefore *opening* a way for felons to regain the franchise that previously did not exist. The Amendment is wholly reformatory and not at all punitive, and it was perverse for the court below to strike it down for not being generous enough, *see Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966), particularly based on a challenge brought by many of the same groups that pressed for the very terms that they, and the district court, now say are unconstitutional. If the district court's judgment is permitted to stand, the People of Florida—and those of the other states in this Circuit—would be well advised to be wary when presented with a

similar "incremental" reform proposal in the future. The district court's erroneous judgment should be reversed.

JURISDICTIONAL STATEMENT

Pursuant to Federal Rule of Appellate Procedure 28(a)(4) and Circuit Rule 28-1(g), Appellants attest that: (1) the district court had subject-matter jurisdiction over Plaintiffs' complaint under 28 U.S.C. §§ 1331 and 1367(a); (2) this Court has subject-matter jurisdiction over the district court's final order and judgment under 28 U.S.C. § 1291; and (3) the district court entered its judgment on May 26, 2020 and Appellants timely filed their notice of appeal on May 29, 2020.

STATEMENT OF THE ISSUES

1. Whether Florida law conditioning felon reenfranchisement on completion of all terms of sentence, including financial terms such as fines and restitution, violates the Equal Protection Clause, as applied to felons unable to pay.

2. Whether Florida law conditioning felon reenfranchisement on payment of fees and court costs imposed as part of a criminal sentence is a "tax" prohibited by the Twenty-Fourth Amendment.

3. Whether Florida's reenfranchisement scheme violates the Due Process Clause because of either a lack of adequate procedures or because of unconstitutional vagueness.

STATEMENT OF THE CASE

I. Factual Background

A. Passage of Amendment 4

Florida's first Constitution empowered the territorial Legislature to "exclude from . . . the right of suffrage, all persons convicted of bribery, perjury, or other infamous crime." *See* Fla. Const. art. VI, § 4 (1838). And when Florida was admitted to the Union in 1845, its General Assembly enacted such a law. *See* 1845 Fla. Laws ch. 38, art. 2, § 3, *available at* https://bit.ly/34eeO3k. This general policy persisted, and, as of late 2018, Florida's Constitution maintained that "[n]o person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights or removal of disability." Fla. Const. art. VI, § 4(a) (2018).

Then, an initiative was placed on the ballot, proposing changes to Article VI, section 4 of the Florida Constitution, as follows (with new sections underlined):

> (a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. Except as provided in subsection (b) of this section, any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.
>
> (b) No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.

See Advisory Op. to the Attorney Gen. re: Voting Restoration Amendment, 215 So. 3d 1202, 1204 (Fla. 2017).

During oral argument before the Florida Supreme Court on whether the initiative petition could appear on the ballot, the attorney for the sponsor of the initiative affirmed the obvious—that the phrase "all terms of sentence" "include[d] the full payment of any fines," A372–A373, and "restitution," A379–A380. In urging voters to support the Amendment, the ACLU of Florida stated that it "would return the eligibility to vote to Floridians who have completed the terms of their sentences, including any probation, parole, fines, or restitution." A400. Indeed, the organization, recognizing that a significant portion of felons would not be eligible for reenfranchisement due to unpaid financial terms, described "the impact of [the] Amendment" as providing merely a "2nd chance" to "as many as 1.4 million" felons who "*could be* eligible for the restoration of their ability to vote *upon payment of fines, fees, and restitution*." A708 (emphases added). And supporters of the amendment, including the Brennan Center, knew that felon reenfranchisement "polls higher" in Florida when payment of fines and other financial punishment was required, and that there would be a "harder fight to win 60% + 1% approval" required to amend the Florida Constitution without that requirement. A748.

Appearing on the ballot during the November 2018 election, the amendment, now known as Amendment 4, received 64.55% of the vote—just above the 60% threshold to amend the Florida Constitution, *see* Fla. Const. art. XI, § 5(e)—and became effective on January 8, 2019.

B. Passage of Senate Bill 7066

Following Amendment 4's adoption, the State Legislature passed, and Governor DeSantis approved, Senate Bill 7066 ("SB-7066"). *See* 2019-162 Fla. Laws 1. SB-7066 provides that "completion of all terms of sentence" in Amendment 4 means "any portion of a sentence that is contained in the four corners of the sentencing document, including, but not limited to" "[f]ull payment of restitution ordered to a victim by the court as a part of the sentence" and "[f]ull payment of fines or fees ordered by the court as a part of the sentence or that are ordered by the court as a condition of any form of supervision, including, but not limited to, probation, community control, or parole." Fla. Stat. § 98.0751(2)(a), (2)(a)5.a–b.

SB-7066 also provides that the financial obligations above "are considered completed" either by: (1) "[a]ctual payment of the obligation in full"; (2) "the termination by the court of any financial obligation to a payee," upon the payee's approval; or (3) completion of community service hours "if the court . . . converts the financial obligation to community service." *Id*. § 98.0751(2)(a)5.e.(I)–(III). SB-7066 specifies that its requirements to pay financial obligations are "not deemed completed upon conversion to a civil lien." *Id.* § 98.0751(2)(a)5.e.

C. The Florida Supreme Court Interprets Amendment 4

On August 9, 2019, Governor DeSantis requested the Florida Supreme Court's opinion on "whether 'completion of all terms of sentence' under [Amendment 4] includes the satisfaction of all legal financial obligations—namely fees, fines and restitution ordered by the court as part of a felony sentence that would otherwise render a convicted felon ineligible to vote." *Advisory Op. to the Governor re: Implementation of Amendment 4*, 288 So. 3d 1070, 1074 (Fla. 2020).

On January 16, 2020, the Florida Supreme Court confirmed the unambiguous meaning of Amendment 4: "all terms of sentence," it held, "includes 'all'—not some—[financial terms of sentence] imposed in conjunction with an adjudication of guilt," including fines, restitution, fees, and costs. *Id.* at 1075. Not only was this interpretation mandated by the plain language of Amendment 4, but it also accorded with the "consistent message" disseminated to the electorate by "the ACLU of Florida and other organizations along with the [Amendment's] Sponsor . . . before and after Amendment 4's adoption." *Id.* at 1077.

II. Prior Proceedings

A. The Preliminary Injunction Proceedings and Prior Appeal

Plaintiffs filed several suits against the Governor and Secretary of State ("the State"), as well as various county Supervisors of Elections, alleging that SB-7066's conditioning of reenfranchisement on the payment of financial terms of sentence

violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Twenty-Fourth Amendment, both on its face and as applied to felons unable to pay. On October 18, 2019, the district court preliminarily enjoined the Secretary from preventing the 17 named Plaintiffs from registering to vote or voting, finding that Plaintiffs were likely to succeed on the merits of their wealth-based equal-protection claim. *See* A473, A476–A478. The State appealed, and on February 19, 2020, a three-judge panel affirmed. *See Jones*, 950 F.3d 795. Applying heightened scrutiny to Plaintiffs' wealth-discrimination claim, the panel held that the State was unlikely to sustain Amendment 4 and SB-7066 under that standard, and it further mused in dicta that the law would likely not survive rational-basis review.

B. The Trial on the Merits and Final Judgment

On April 7, 2020, the district court certified a proposed class for Plaintiffs' Twenty-Fourth Amendment claim consisting of "all persons who would be eligible to vote in Florida but for unpaid financial obligations." *See* A668. The court certified a wealth-discrimination subclass consisting of "all persons who would be eligible to vote in Florida but for unpaid financial obligations that the person asserts the person is genuinely unable to pay." A669. The subclass alone covered several hundreds of thousands of felons. *See* A659.

After an eight-day bench trial, the district court issued its opinion on the merits on May 24, 2020. *See* A1034–A1158. As relevant here, the court held the State's reenfranchisement scheme unconstitutional insofar as it (1) restricts felons from voting who are otherwise eligible but "genuinely unable to pay the required amount" of the financial terms of their sentences; (2) requires felons to pay "amounts that are unknown and cannot be determined with diligence"; and (3) requires felons "to pay [court] fees and costs as a condition of voting." A1151; *see also* A1162–A1163. The district court enjoined the State from taking "any step to enforce any requirement declared unconstitutional." A1152. It also replaced the reenfranchisement process set out in Florida law with new procedures requiring the Division of Elections, when requested by a felon, to issue an advisory opinion that details the precise amount outstanding on the felon's sentence and provides a factual basis for any finding that the felon is able to pay. A1151–A1152. Additionally, the district court mandated that failure of the Division of Elections to respond to a felon's advisory opinion request within 21 days would render the felon eligible to vote. A1152.

On May 29, 2020, the State noticed its appeal and moved the district court to stay its judgment pending appeal. On June 2, the State petitioned the full Court for initial hearing en banc. After the district court denied the State's stay motion on June 14, the State moved this Court for a stay on June 17. The Court granted the

State's petition for initial hearing en banc and stayed the district court's order on July 1.

On July 8, Plaintiffs filed an application with the Supreme Court requesting vacatur of the en banc Court's stay order, which the Supreme Court denied on July 16.

III. Standard of Review

To obtain a permanent injunction, a plaintiff "must establish actual success on the merits, as opposed to a likelihood of success." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006). Although this Court "review[s] the district court's entry of a permanent injunction for an abuse of discretion, the district court's underlying legal conclusion"—that Amendment 4 and SB-7066 violate the Constitution—"is reviewed *de novo*." *Thomas v. Bryant*, 614 F.3d 1288, 1303 (11th Cir. 2010); *see also United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir. 2005) (noting that the Court reviews de novo the constitutionality of a statute). This Court reviews factual findings for clear error. *Thomas*, 614 F.3d at 1307.

SUMMARY OF ARGUMENT

Amendment 4 and SB-7066 are constitutional. The district court erred in concluding otherwise.

First, neither Amendment 4 nor SB-7066 discriminate based on wealth in violation of the Fourteenth Amendment. Plaintiffs have no wealth-discrimination

claim to make because they have never alleged, let alone proved, a discriminatory purpose animating the passage of either Amendment 4 or SB-7066. Even if Plaintiffs could state such a wealth-discrimination claim, Amendment 4 and SB-7066 must be scrutinized according to rational-basis review, and they easily pass that test. Indeed, because the State has compelling interests in ensuring that felons pay their full debts to society and in treating all felons equally, Amendment 4 and SB-7066 would survive even heightened scrutiny.

Second, Plaintiffs do not have a cognizable injury for purposes of the Twenty-Fourth Amendment because they forfeited their constitutional voting rights when they were convicted of felonies. At that moment they had no more right to vote than a child or a non-citizen. Even if the Twenty-Fourth Amendment did apply, the requirement that felons complete the financial terms of their sentences is not an unconstitutional tax. While the district court concluded that court costs and fees are "other tax[es]" that raise revenue for the government, such obligations are imposed as part of felons' *criminal sentences*. SB-7066 does not change the obligations incurred in felons' criminal sentences to unconstitutional taxes under the Twenty-Fourth Amendment.

Third, while the district court did not appear to definitively rule on Plaintiffs' procedural due-process claim, to the extent that it did make such a ruling, it was in error. Indeed, once recognizing that Plaintiffs' wealth-discrimination claim lacks

merit, whatever due-process concerns exist should be swept away, as the district court's remedial ruling depends almost entirely on its mistaken conclusion that the State may not withhold reenfranchisement from felons unable to pay the financial terms of their sentences. Moreover, even if the district court assessed Plaintiffs' vagueness and procedural due-process claims as applied to the small group of felons potentially relevant to those inquiries—those felons who are able to pay but are unsure if they have outstanding obligations—both claims would still fail.

Fourth, if Plaintiffs and the district court were correct on the merits, the appropriate remedy under Florida's severability principles would be to invalidate Amendment 4 in its entirety. Any other result would expand the reach of felon reenfranchisement beyond what Florida voters intended.

ARGUMENT

I. Florida's Reenfranchisement Scheme Does Not Violate the Equal Protection Clause.

A. Amendment 4 and SB-7066 Were Not Adopted for the Purpose of Discriminating Against Indigents.

Plaintiffs have consistently framed their equal-protection claim as a "wealth-based discrimination" challenge, *see, e.g.*, A81, alleging that SB-7066 prevents those unable to pay their financial terms of sentence from restoring their right to vote. Wealth, however, is not a suspect classification akin to race, sex, or national origin, *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28

(1973), so a wealth-based classification does not, standing alone, trigger heightened scrutiny. And SB-7066's challenged classification is not even drawn along the lines of wealth; it distinguishes only between those felons who "complet[e] all terms of sentence" and those who do not complete all such terms.

Plaintiffs' real complaint, therefore, is that Amendment 4 and SB-7066's bear more heavily on those felons who have not completed their sentences because they are unable to pay their financial terms of sentence than on those who have completed their sentences in full. But they make no claim that Amendment 4 and SB-7066 were adopted for the purpose of discriminating against impecunious felons. Plaintiffs' claim thus represents precisely the kind of disparate-impact theory of equal protection that the Supreme Court has rejected even in cases involving race and other suspect classes. *See, e.g.*, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (sex); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (race). Indeed, this Court has rejected the same theory in the context of indigency, *see Joel v. City of Orlando*, 232 F.3d 1353, 1359 (11th Cir. 2000), and in the reenfranchisement context specifically, explaining that "a reenfranchisement scheme could violate equal protection if it had *both* the purpose and effect of invidious discrimination," *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018).

Under Plaintiffs' theory, when a facially *wealth-neutral* statute is alleged to disproportionately disadvantage those unable to pay some amount, those persons so

disadvantaged can bring a wealth-discrimination claim even in the absence of discriminatory purpose. But, under the Supreme Court's precedents, even when a facially *race-neutral* statute is alleged to disproportionately disadvantage blacks, a failure to prove a discriminatory purpose "ends the constitutional inquiry." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 271 (1977). It cannot be correct that the Equal Protection Clause's protection against wealth discrimination is more robust than its protection against racial discrimination when race is a suspect class, and indigency is not.

To surmount this hurdle, the *Jones* panel relied on the Supreme Court's decision in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), asserting that it stands for the proposition that the "intent requirement is not applicable in wealth discrimination cases." 950 F.3d at 828. This misreads *M.L.B.* To be sure, the Court there declined to impose *Davis*'s purposeful-discrimination requirement on a narrow sliver of earlier wealth-discrimination cases in which a wealth-neutral law's disadvantages "are not merely *disproportionate* in impact," but instead "apply to *all* indigents and *do not reach anyone outside that class*." 519 U.S. at 127 (second and third emphases added).

Plaintiffs' challenge to SB-7066 does not fall within the narrow exception identified by the Court in *M.L.B.*, for its payment requirements do not inhibit restoration of voting rights for "all indigents" and no one "outside that class." As

Plaintiffs emphasized below, a felon could even be "a millionaire" yet unable to repay an outsized financial penalty. *See* A617.

To get around this problem, the *Jones* panel invented a new doctrinal category: the "truly indigent," which it defined as "those genuinely unable to meet their financial obligations to pay fees and fines, and make restitution to the victims of their crimes." 950 F.3d at 813. But "indigency" means that an individual "lacks the means of subsistence," *United States v. Shepherd*, 922 F.3d 753, 758 (6th Cir. 2019) (quoting *Black's Law Dictionary* 891 (10th ed. 2014)), or has an income "beneath any designated poverty level," *San Antonio Indep. Sch. Dist.*, 411 U.S. at 22–23. It does not capture all persons who, regardless of wealth, are unable to satisfy their financial obligations.

The *Jones* panel's capacious definition of "indigency"—untied to any absolute level of poverty—would nullify the Supreme Court's distinction in *M.L.B.* between the general discriminatory-purpose requirement and those rare cases involving disadvantages that only "apply to all indigents and do not reach anyone outside that class." 519 U.S. at 127. That is because if "indigency" simply meant "unable to pay," then *every* law requiring payment for some benefit would disadvantage "all indigents"—those unable to pay—and would not disadvantage "anyone outside that class"—those able to pay. *See id.* That understanding of "indigency" is flatly inconsistent with *M.L.B.*, not to mention the English language.

Finally, although the district court initially accepted Plaintiffs' wealth-discrimination claim even though Plaintiffs "ha[d] not alleged—let alone established . . . that Florida's scheme has a discriminatory purpose," *Hand*, 888 F.3d at 1270; A1068–A1071, in its subsequent order denying the State's stay motion, the court belatedly attempted to repair this fatal defect, purporting to find as a fact that "[t]he Legislature would not have adopted SB7066 but for the actual motive to favor individuals with money over those without," A1179. This sua sponte "finding" is baseless.

As a threshold matter, the court did not have jurisdiction to retroactively fill in this gaping factual hole in its judgment on the merits, because the State's filing of a notice of appeal "transfer[red] adjudicatory authority from the district court to the court of appeals," *Manrique v. United States*, 137 S. Ct. 1266, 1271 (2017), and therefore "divest[ed] the district court of its control over those aspects of the case involved in the appeal," *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam). More fundamentally, the district court's finding was founded on a tautology—that when the Florida Legislature enacted the text of SB-7066, it was fully aware that felons who are unable to pay their financial terms of sentence will in fact not pay their financial terms of sentence. *See* A1178–A1179. The Legislature's mere knowledge of SB-7066's potential effects obviously does not satisfy the requirement that an equal-protection plaintiff prove that the allegedly

discriminatory measure was adopted "because of, not merely in spite of," its unequal impact. *Feeney*, 442 U.S. at 279 (quotation omitted). Finally, this "finding" flies in the face of the Legislature's choice to create avenues for completing financial terms of sentence other than payment, such as conversion to community service hours.

Because SB-7066 does not, in practical effect, preclude *only* genuinely indigent felons from restoring their rights to vote, and because Plaintiffs have not shown that Amendment 4 and SB-7066 were adopted "because of, not merely in spite of," any purported "adverse effects" upon felons unable to complete the financial aspects of their sentences, *id.*, they cannot sustain a wealth-discrimination claim.

B. Amendment 4 and SB-7066 Are Subject to Rational-Basis Review.

In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court confirmed that denying convicted felons the franchise—even permanently—does not run afoul of the Constitution. It follows that a disenfranchised felon, by definition, no longer has a right to vote and any opportunity the State later offers him to restore that right is a matter of grace. And unless the State's reenfranchisement scheme "categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

As Justice O'Connor, sitting by designation on the Ninth Circuit, explained in *Harvey v. Brewer*, 605 F.3d 1067, felons challenging a reenfranchisement scheme "cannot complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted under the terms of *Richardson*." *Id.* at 1079. Instead, what those felons "are really complaining about is the denial of the statutory benefit of re-enfranchisement that [the State] confers upon certain felons," and courts "do not apply strict scrutiny as [they] would if [the felons] were complaining about the deprivation of a fundamental right." *Id.*

Every other court of appeals to consider felon reenfranchisement has adopted this same analytical framework, *see Johnson*, 624 F.3d at 746; *Hayden*, 594 F.3d at 171; *Owens*, 711 F.2d at 27; *see also Madison*, 163 P.3d at 768–69, including this Circuit, *see Shepherd*, 575 F.2d at 1114–15. They have therefore concluded that the relevant constitutional question is whether the legislative classification is "rationally related to a legitimate state interest." *Harvey*, 605 F.3d at 1079. The *Jones* panel attempted to distinguish *Shepherd* because that case did not involve a wealth classification, *see* 950 F.3d at 823–24, but *Shepherd* held generally that rational-basis review applies to "selective . . . reenfranchisement of convicted felons," 575 F.2d at 1114–15.

Plaintiffs assert that this case is instead governed by some amalgam of the Supreme Court's precedents in *Harper v. Virginia State Board of Elections*, 383 U.S.

663 (1966), *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Bearden v. Georgia*, 461 U.S. 660 (1983). But none of these cases, considered alone or in combination, justify departure from rational-basis review.

1. *Harper v. Virginia State Board of Elections* is inapposite.

Begin with *Harper*. There, the Supreme Court held unconstitutional a Virginia law making the payment of a $1.50 poll tax a prerequisite to voting in state elections. In doing so, the Court referred to the "fundamental" right to vote no fewer than three times in its opinion. *See* 383 U.S. at 667, 670. The Court reiterated that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Id.* at 670. And because the fundamental right to vote was conditioned on the payment of a tax that itself had "no relation to voting qualifications," *id.*, the Court held that the tax violated the Equal Protection Clause.

Harper is wholly inapplicable to this case: its holding was predicated on the tax's infringement on the fundamental right to vote, a right held by the Virginia electorate generally. Here, however, a felon has no more right to vote than does a child or a non-citizen. Therefore, the only constitutional duty imposed on the State is that its treatment of felons be rationally related to a legitimate government interest.

Moreover, *Harper*'s holding—that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter

or payment of any fee an electoral standard," *id.* at 666—is inapplicable here for a second reason. Amendment 4 and SB-7066 do not "make[] affluence of the voter . . . an electoral standard," *id.*, because do not create "[l]ines drawn on the basis of wealth," *id.* at 668; *see also McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). Rather, their requirements apply to felons regardless of the terms of sentence they must complete or their personal capacity to do so. And, quite unlike *Harper* itself, Amendment 4 and SB-7066 do not require the "payment of a fee," 383 U.S. at 668, even assuming such a payment would implicate the fundamental right to vote. *Harper* dealt with an arbitrary, uniform poll tax which, by its very design, made wealth the *sole* criterion for voting; if a voter had $1.50, he could vote, and if he did not have enough, he could not vote.

Amendment 4 and SB-7066 are different because the payments that they require a felon to make were imposed as punishment for committing a felony; they are not "fees" imposed as an "electoral standard" with which every voter must comply. Indeed, the only voting-related forms of wealth discrimination that Plaintiffs identify are explicit poll taxes and candidate filing fees. And both of those share a common feature: They impose a flat fee on all voters that necessarily "ma[kes] affluence of the voter an electoral standard, and such a standard is irrelevant to permissible voter [or candidate] qualifications." *Gonzalez v. Arizona*,

677 F.3d 383, 408–09 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013).

Finally, *Harper* is inapposite because the Court there assumed that members of the Virginia electorate were "otherwise qualified" to vote under State law, and the poll tax "introduce[d] a capricious or irrelevant factor." 383 U.S. at 668; *see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 (2008) (opinion of Stevens, J.) (explaining that "restrictions on the right to vote are invidious *if they are unrelated to voter qualifications*" (emphasis added)). Here, however, any payments felons must make to complete their financial terms of sentence are *directly* related to their qualifications to vote because they were imposed as punishment for the crimes that forfeited their rights to vote in the first place. *See Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 51 (1959) (noting that a "previous criminal record" is an "obvious example[]" of a factor that a State "may take into consideration in determining the qualifications of voters").

Plaintiffs' reading of *Harper* would endanger *any* law that made voting more expensive for some people than others, even if the additional cost was closely related to voter qualifications. For example, state laws requiring voters to provide documents proving their identity are likely vulnerable under Plaintiffs' view, for some individuals would inevitably have to pay to obtain the documents. The Ninth Circuit, sitting en banc, rejected precisely this sort of challenge, holding that

"[r]equiring voters to provide documents proving their identity is not an invidious classification based on impermissible standards of wealth or affluence, even if some individuals have to pay to obtain the documents." *Gonzalez*, 677 F.3d at 409. The Supreme Court had previously done the same in another case involving voter identification. *See Crawford*, 553 U.S. at 198 n.17, 199 (upholding a voter identification scheme even though some "persons who because of economic or other personal limitations may find it difficult . . . to secure a copy of their birth certificate" because it costs between $3 and $12). If requiring some people to pay to *prove* their qualifications to vote does not run afoul of *Harper*, then surely requiring felons to satisfy the terms of their criminal sentences to *become qualified* should not either, especially when those terms are not arbitrary but instead were calibrated to a particular crime and imposed by a judge or jury.

Having failed to justify application of heightened scrutiny based on *Harper*, Plaintiffs invoke two other lines of wealth-discrimination precedents, one involving the denial of access to the judicial process for inability to pay transcript and other fees, the other involving imposition of imprisonment for inability to pay criminal fines. Both lines of precedent are wholly inapposite.

2. *Griffin v. Illinois* and other access-to-judicial-process cases are inapposite.

First, in *Griffin v. Illinois*, 351 U.S. 12, the Court held unconstitutional a statute that "effectively conditioned thoroughgoing appeals from criminal

convictions on the defendant's procurement of a transcript of trial proceedings." *M.L.B.*, 519 U.S. at 110. *Griffin*'s holding has been applied to transcript and filing fees related to a variety of other legal proceedings. *See, e.g.*, *M.L.B.*, 519 U.S. 102 (transcript fees to appeal the termination of parental rights); *Mayer v. City of Chicago*, 404 U.S. 189 (1971) (transcript fees to appeal in nonfelony cases). But the Supreme Court has carefully circumscribed *Griffin* to cases involving access to the judicial process. *See, e.g.*, *Christopher v. Harbury*, 536 U.S. 403, 413 (2002) (describing the "denial-of-access cases challenging filing fees that poor plaintiffs cannot afford to pay" in "direct appeals or federal habeas petitions in criminal cases, or civil suits asserting family-law rights"); *Lewis v. Casey*, 518 U.S. 343, 354 (1996) (calling the *Griffin* line "access-to-courts cases"); *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 460 (1988) (noting that each *Griffin*-like case "involved a rule that barred indigent litigants from using the judicial process in circumstances where they had no alternative to that process"). As the Court explained in *M.L.B.*, the relevant set of decisions "concerning access to judicial processes[] commenc[ed] with *Griffin* and [ran] through *Mayer*." 519 U.S. at 120.

This case does not concern "access to judicial processes in cases criminal or quasi criminal in nature," *id.* at 124 (quotation omitted), and so there is no basis for bringing Amendment 4 and SB-7066 into the narrow exception from rational-basis scrutiny for such cases. Plaintiffs' understanding of *Griffin*—unmoored from the

right of access to judicial process—would upend traditional notions of equal-protection jurisprudence. As this Court previously explained when invited to expand *Griffin* in the manner pressed here by Plaintiffs, if *Griffin* were untethered from its access-to-judicial-process context, it would conceivably "apply to any government action that treats people of different means differently." *Walker v. City of Calhoun*, 901 F.3d 1245, 1264 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1446 (2019). And then "[d]isparate treatment based on wealth . . . would be treated the same as official religious or racial discrimination," an approach that would represent a "radical . . . application of the Equal Protection Clause" that the Supreme Court has firmly rejected. *Id.* (citing *San Antonio Indep. Sch. Dist.*, 411 U.S. at 24).

3. *Bearden v. Georgia* and the other cases condemning imposition of imprisonment for failure to pay a fine are wholly inapposite.

Along with the *Griffin* line of cases, Plaintiffs rely heavily on a trilogy of decisions culminating in *Bearden v. Georgia*, 461 U.S. 660. These cases concern the power of the State to imprison individuals for failure to pay criminal financial penalties. *See also Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970). In *Williams* and *Tate*, the Court held that a State may not "impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." *Tate*, 401 U.S. at 398 (quotation omitted). And in *Bearden*, the Court held that a

State may not revoke an individual's probation—and therefore imprison him—for failure to pay a fine or restitution, when his failure to do so results from indigency. *See* 461 U.S. at 672.

The rule of *Williams*, *Tate*, and *Bearden* is simple: when the State has determined that its interests in punishing a crime are satisfied by imposition of a fine rather than imprisonment, it may not then *imprison* an individual solely because he is unable to pay the fine. Indeed, the Court's exclusive focus on imprisonment is brought into sharp focus by the Court's insistence in *Bearden* that sentencing courts first "consider alternative measures of punishment *other than imprisonment*" to satisfy their legitimate interests in punishing an indigent lawbreaker unable to pay his fine. *Id.* at 672 (emphasis added). Because Amendment 4 and SB-7066 do not implicate imprisonment, Plaintiffs' challenge to the laws clearly falls outside the scope of *Williams*, *Tate*, and *Bearden*.

Plaintiffs' attempt to shoehorn this case into *Bearden* misunderstands the doctrinal foundation of the decision. Departure from rational-basis review was justified in *Bearden* because "[d]ue process and equal protection principles converge[d]" in that kind of case. *Id.* at 665. In other words, the equal-protection concern in *Bearden* was "substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine." *Id.* at 666. That is

because "[t]he Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation" above and beyond other statutory benefits. *Black v. Romano*, 471 U.S. 606, 610 (1985). While there is no constitutional right to probation, "once a State grants a prisoner the conditional liberty properly dependent on the observance of special [probation] restrictions, due process protections attach to the decision to revoke [probation]." *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973). Like parole, probation "includes many of the core values of unqualified liberty." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

Unlike the "conditional liberty [from incarceration] created by probation" at stake in *Bearden*, which could be revoked if the probationer violated the terms of his probation, Plaintiffs here do not have a similar conditional franchise. They can regain the right to vote only if they fulfill the conditions *necessary to bring that right into existence*. In other words, while the probationer in *Bearden* had a vested—albeit conditional—interest in remaining out of prison, Plaintiffs here have *no right to vote* because they forfeited the right to vote upon conviction. To make Plaintiffs' claim analogous to the probationer's claim in *Bearden*, Florida would have to conditionally reenfranchise all felons—thereby creating a conditional right to vote—subject to revocation upon failure to satisfy a condition, such as payment of financial terms of sentence. But Amendment 4 and SB-7066 do no such thing; they confer the right to

vote only "*upon* completion of all terms of sentence." Fla. Const. art. VI, § 4(a) (emphasis added). That is why it is a statutory benefit dissimilar from probation. And "when dispensation of a statutory benefit is clearly at the discretion of [a State] . . . then there is no creation of a substantive interest protected by the Constitution." *Jean v. Nelson*, 727 F.2d 957, 981 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

Even if one were to read *Bearden* and its predecessors more broadly, they would still lend no help to Plaintiffs. Stated at the highest level of generality, *Bearden* holds that once a State has concluded that "the outer limit" of punishment "necessary to satisfy its penological interests and policies" in a particular case does not include imprisonment, it cannot then subject the defendant to the *additional* punishment of imprisonment "solely by reason of [his] indigency." 461 U.S. at 667; *see also Williams*, 339 U.S. 235. Florida has maintained for nearly two hundred years that its interests in punishment *require* that felons lose their right to vote upon conviction. Forfeiture of the right to vote is in a very real sense a mandatory minimum—an essential part of the "outer limit" of punishment necessary to satisfy the State's penological interests.

Amendment 4 and SB-7066 do not augment the outer limit of a felon's sentence with an *additional punishment*; they replace a permanent punishment with one that can be removed conditionally. Nor do they not convert one form of punishment into another, more severe form, as in *Bearden*. Instead, they dictate that

one form of otherwise permanent punishment lawfully imposed as part of a felon's original sentence continues only until the felon completes all other part of his full sentence. They are thus wholly unlike what the Court confronted in *Bearden*.

Indeed, the point is readily illustrated by a hypothetical that would, in fact, approximate *Bearden*: Consider a State where felons are *not* automatically disenfranchised upon conviction. But that same State provides that if a felon is sentenced to pay a fine but fails to do so, even if he is indigent and genuinely unable to pay it, he must forfeit his right to the franchise. The State thus concluded that its penological interests in punishing that felon did not require forfeiture of his right to vote; it only required that he pay a fine. Thus, by stripping the felon of his right to vote for mere inability to pay his fine, the State does not punish the felon for his initial crime. Rather, it is imposing punishment on the *separate* offense of failing to pay the fine. *Bearden* would cast doubt on the constitutionality of that kind of add-on punishment, when applied to those unable to pay.

But neither Amendment 4 nor SB-7066 works in such a fashion. The felon's loss of his right to vote is part and parcel of his conviction, and it attaches not because the felon cannot pay a financial term of his sentence but because he *committed a felony* in the first place. Although Amendment 4 and SB-7066 allow that punishment to continue, they by no means operate like the laws at issue in *Williams*, *Tate*, or *Bearden*.

This aspect of Amendment 4 and SB-7066—that they do not themselves disenfranchise any felon—reveals another fundamental error in Plaintiffs' equal-protection theory. As the Court explained long ago, "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights, is inapplicable" when "the distinction challenged . . . is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise." *Katzenbach*, 384 U.S. at 657 (citation omitted); *see also San Antonio Indep. Sch. Dist.*, 411 U.S. at 39 (extending *Katzenbach*'s deferential standard to "affirmative and reformatory" State statutes).

Felon disenfranchisement in Florida *is a consequence of felony conviction*, and before the State's adoption of Amendment 4 and SB-7066, there was *no automatic restoration* of felon voting rights in the State. Amendment 4 and SB-7066 therefore *opened* a way for felons to regain the franchise that previously did not exist. They are reformatory and, unlike the law at issue in *Bearden*, not at all punitive, and it would be perverse to strike them down for not being generous enough. Indeed, perversity would be conjoined with duplicity in a decision striking down a discretionary reform measure like Amendment 4 based on a challenge brought by many of the same groups that, in advocating its adoption, assured the voters that it required completion of the very financial terms of sentence that they, and the district court, now say are unconstitutional.

Despite *Katzenbach*'s admonition that "reform may take one step at a time," 384 U.S. at 657 (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)), Plaintiffs demand that Florida take one giant leap or no step at all. Neither the Constitution, nor any precedents interpreting it, demand such an extreme result. To the contrary, "that [Florida] has not gone still further . . . should not render void its remedial legislation." *McDonald*, 394 U.S. at 811.

C. SB-7066 Is Rationally Related to Legitimate Government Interests.

Once Plaintiffs' quest to apply heightened scrutiny falls by the wayside, the only question that remains is whether SB-7066 satisfies the rational-basis standard. That standard is exceedingly deferential—"the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018); *see also District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008); *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001). Amendment 4 and SB-7066 are no different: it is entirely rational for the People of Florida to demand that *all* felons complete *all* terms of sentence, including *all* financial terms, before they welcome a felon back into the body politic. Indeed, for many Floridians, it is simple justice.

The kind of scrutiny that the district court had in mind bears no resemblance to the doctrine applied by this Court or any other. The court's first error rested in its disregard of the principle that rational-basis review requires courts only to consider

whether "the legislative *classification*" at issue is rational. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (emphasis added). Because Amendment 4 and SB-7066 make a distinction between felons who complete all terms of sentence and those who do not, the rational-basis inquiry therefore asks only whether the State could rationally draw a line treating *all* felons of *all* levels of wealth the same with respect to voting restoration.

The district court nevertheless believed that because a plaintiff is generally not "preclude[d] . . . from asserting that a provision [of a statute] is unconstitutional as applied to the plaintiff," rational-basis review could proceed by considering not the rationality of the law's classification, but the rationality of a classification's effect on Plaintiffs. A1073. This is wrong. As this Court has explained, rational-basis review provides that "a court reviewing the constitutionality of a *classification* only may strike down the *classification* if the *classification* is without *any* reasonable justification." *In re Wood*, 866 F.2d 1367, 1370 (11th Cir. 1989) (first three emphases added). Therefore, "even if in a particular case the classification, *as applied*, appears to discriminate irrationally, the classification must be upheld if 'any set of facts reasonably may be conceived to justify it.' " *Id.* at 1370–71 (emphasis added) (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)); *see also Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006) (explaining that rational-basis review's "basic formulation"—asking whether "any reasonably

conceivable state of facts . . . could provide a rational basis for the *classification*"—"applies whether the plaintiff challenges a statute on its face, *as applied*, or . . . challenges some other act or decision of government" (emphases added) (quotation omitted)). Indeed, any other approach to rational-basis review would entail striking down applications of virtually any statute, regardless of the reasonableness of the underlying classification because "[n]early any statute which classifies people may be irrational as applied in particular cases." *Beller v. Middendorf*, 632 F.2d 788, 808 n.20 (9th Cir. 1980) (Kennedy, J.).

The district court relied on but a single equal-protection case, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), to support its reimagination of rational-basis review. But *City of Cleburne* involved the application of a zoning ordinance requiring a special use permit for a home for the mentally disabled that could only be explained as the product of "an irrational prejudice against the mentally retarded." *Id.* at 450; *see also Trump*, 138 S. Ct. at 2420. Here, however, there is no evidence that the classification drawn by the State is inexplicable beyond irrational prejudice against those felons unable to pay the financial terms of their sentences.

Homing in on the legislative classification drawn by Amendment 4 and SB-7066—between felons who complete all their terms of sentence and those who do not—it should be obvious that the classification easily survives review for mere

rationality. Plaintiffs cannot reasonably argue that the State has no legitimate interest in treating all felons equally, regardless of financial circumstance. Just as the State may demand that *every* incarcerated felon complete his prison term—regardless of his life expectancy—before restoring his voting rights, it may demand that every felon with financial terms of sentence pay them—regardless of his financial prospects. This interest—that *all* felons complete *all* terms of sentence to repay their debt to society, as determined by the judge and/or jury that found them guilty of committing a felony—is the very definition of *justice*. *See Owens*, 711 F.2d at 28 (The State can "rationally determine that [only] those convicted felons who had served their debt to society . . . should therefore be entitled to participate in the voting process."); *Madison*, 163 P.3d at 772 (The State "clearly has an interest in ensuring that felons complete all of the terms of their sentence."). And given that Florida has a legitimate—indeed, compelling—interest in enforcing the punishments it has imposed for violations of its criminal laws, *see Moran v. Burbine*, 475 U.S. 412, 426 (1986), Amendment 4 and SB-7066 bear a rational relation to the achievement of that end. Indeed, Amendment 4 and SB-7066 are *narrowly tailored* to the achievement of that compelling interest because demanding that every felon satisfy in full his debt to society is the State's only method for ensuring that no felon who falls short will automatically be allowed to rejoin the electorate.

The fulcrum for the *Jones* panel's contrary determination was its belief that Amendment 4 and SB-7066 "punish[] more harshly" felons unable to pay "than those who committed precisely the same crime" and that such a punishment "is linked not to their culpability, but rather to . . . their wealth," and is therefore illegitimate. 950 F.3d at 812. This is profoundly wrong.

Shepherd long ago established that when a State chooses to reenfranchise some felons, it is not constitutionally required to reenfranchise all felons who share similar levels of culpability. There, the only difference between the felons who could regain the franchise and those who could not was that the former were placed on probation by Texas state courts and the latter were placed on probation by federal courts. *See Shepherd*, 575 F.2d at 1112. Thus, felons with equal degrees of culpability could be treated differently; their eligibility for reenfranchisement hinged not on the substance of their conduct but on the court system in which they were convicted and probated. But *Shepherd* nonetheless *upheld* the Texas scheme, *id.* at 1114–15, and nowhere did the Court even hint that treating felon groups differently with regard to voting rights required the State to calibrate reenfranchisement to culpability.

More fundamentally, the *Jones* panel's assertion that Amendment 4 and SB-7066 "punish[]" Plaintiffs "more harshly," 950 F.3d at 812, ignores that neither law punishes anyone. Again, a felon loses his right to vote as punishment for

committing a felony, not for being unable to satisfy the financial terms imposed as part of that sentence. The financial terms, like any other terms of a sentence, are simply part of the debt that the felon owes to society, as measured by the judge and jury who imposed it on behalf of society. Thus, Amendment 4 and SB-7066 are reform measures alleviating punishments already lawfully rendered. Such reform measures are "not invalid under the Constitution because [they] might have gone farther than [they] did." *Katzenbach*, 384 U.S. at 657.

Plaintiffs and the district court also asserted that Amendment 4 and SB-7066 are irrational because of various decisions made by the State government after the SB-7066's enactment. To begin, it is not at all clear how these administrative measures designed to implement Amendment 4 and SB-7066 are relevant to the central question presented by rational-basis review: whether the classification drawn *by the People of Florida and the Florida Legislature* is rationally related to a legitimate government interest. The determinations of Florida's executive branch cannot be attributed to the People of Florida and the Florida Legislature, and the implementation of Amendment 4 and SB-7066 cannot form a basis for attacking the constitutionality of *the amendment and the statute themselves*.

In any event, Plaintiffs' objections to the implementation of SB-7066 largely ignore the foundational tenet that a statute comes to the court under rational-basis review "bearing a strong presumption of validity, and those attacking the rationality

of the legislative classification have the burden to negative every conceivable basis which might support it." *Beach Commc'ns, Inc.*, 508 U.S. at 314–15 (citation and quotation omitted). Indeed, "legislative classifications are valid unless they bear *no rational relationship* to the State's objectives." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979) (emphasis added).

Given that Florida has a legitimate interest in demanding a full measure of justice from every felon, Amendment 4 and SB-7066 bear a rational relation to the achievement of that end. Plaintiffs' allegations of "irrationality" are baseless. For example, Plaintiffs and the district court assailed the so-called "first-dollar policy," *see* A1089–A1096, which credits payments from felons on the total outstanding balance of their financial obligations—which includes fines, fees, or costs that accrue *after* the felon's sentence is imposed—first toward satisfaction of the financial obligations ordered as part of the criminal sentence. Amendment 4 and SB-7066 require that felons pay only the monetary amounts set forth in their sentencing documents to be reenfranchised; the first-dollar policy supports exactly that. This policy is thus consistent with the State's demand that every felon pay his debt to society in full, *as that debt was defined at sentencing*. Moreover, the first-dollar policy *benefits* felons; it seeks merely to strike a fair balance between the State's criminal justice interests and administrability and felons' interest in prompt restoration once they have paid amounts equal to those imposed by their sentences.

At the very least, because "the rational relationship between the means adopted" via the first-dollar policy "and the legislation's purpose" is " 'at least debatable' " it satisfies rational-basis review. *Gary v. City of Warner Robins*, 311 F.3d 1334, 1339 (11th Cir. 2002) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938)).

The district court also impugned the rationality of Amendment 4 and SB-7066 based on its finding that "the mine-run of felons affected by the pay-to-vote requirement are genuinely unable to pay." A1075. But even if this were true, it does not undermine the rationality of the Florida electorate's choice to grant the franchise only to those felons who had paid their debt to society *in full*. In any event, legislative choices scrutinized under rational-basis review are "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315. Indeed, even if the "assumptions underlying [legislative] rationales may be erroneous," the "very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the [legislative] choice from constitutional challenge." *Id.* at 320 (quoting *Vance v. Bradley*, 440 U.S. 93, 112 (1979)) (first and third alterations added).

Accordingly, to the extent that the State Legislature acted on the understanding that many felons would, over time, be able to complete the financial terms of their sentences, that assumption would have certainly been "arguable."

Plaintiffs' own expert, Dr. Daniel A. Smith, calculated that 22.6% of otherwise eligible felons had no outstanding financial terms and that another 31.6% owed less than $1,000. *See* A687.[1] It would not have been irrational for the Legislature to assume that the 54.2% of felons owing less than $1,000 would eventually be able to repay that debt. And permitting automatic reenfranchisement for felons who lack the means to make a lump sum repayment of their financial terms of sentence *today* could easily disincentivize some felons from *ever* completing those terms, even if they might be able to do so over a period of years.

D. Amendment 4 and SB-7066 Are Constitutional Even If Analyzed under the *Bearden* Test.

Even if heightened scrutiny applies to Plaintiffs' wealth-discrimination claim, Amendment 4 and SB-7066 are constitutional. The *Bearden*-based approach adopted by the *Jones* panel analyzed 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

[1] This statistic is also further proof that the *Jones* panel's idea of "indigency" is implausible. *See supra* Part I.A. Even if one wanted to describe some of the 54.2% of felons as "indigent" because they cannot make an immediate $1,000 payment to restore their voting rights, that would mean that 60% of Americans are also "indigent." *See* Adrian D. Garcia, *Survey: Most Americans Wouldn't Cover a $1K Emergency With Savings*, BANKRATE (Jan. 16, 2019), https://bit.ly/30QTh2D. The Supreme Court's precedents regarding "indigents" simply do not cover the financial circumstances of most Americans.

for effectuating the purpose.' " 950 F.3d at 825 (quoting *Bearden*, 461 U.S. at 666–67). Each factor favors the State.

First, the individual interest here is not weighty because felons—by virtue of their convictions—cannot complain that Amendment 4 or SB-7066 deprives them of a fundamental right to vote. Rather, what they complain about "is the denial of [a] statutory benefit of re-enfranchisement." *Harvey*, 605 F.3d at 1079.

Second, Amendment 4 and SB-7066 do not adversely affect felons *at all* because those laws do not disenfranchise *anyone*. They only provide an opportunity for automatic reenfranchisement to all felons. This stands in stark contrast to *Bearden* itself, where the trial court's revocation of the petitioner's probation had adversely changed the felon's circumstances—it caused his incarceration. Furthermore, Florida's requirements do not result in permanent disenfranchisement for most felons based on Plaintiffs' own evidence that approximately 54.2% of felons owe $1,000 or less. *See* A687–A688. Surely some portion of that class can pay off those totals over time.

Moreover, whatever effect Amendment 4 and SB-7066 may have on felons unable to meet the laws' requirements, it is mitigated by the three other means by which felons unable to pay the financial terms of their sentences may regain their right to vote: (1) termination of the terms "[u]pon the payee's approval," Fla. Stat. § 98.0751(2)(a)5.e.(II); (2) completion of community service upon conversion by a

court, *id.* § 98.0751(2)(a)5.e.(III); and (3) clemency ordered by the Executive Clemency Board, *see* Fla. R. Exec. Clemency 9, 10 (2020).

Third, the means chosen by Amendment 4 and SB-7066 are rationally related to the legislative purpose of demanding that felons repay their debt to society. Indeed, the laws' requirements are a perfect fit with the State's interest in ensuring that only felons who have completed all terms of their sentences are automatically welcomed back to the electorate.

The *Jones*'s panel's central criticism was that applying Amendment 4 and SB-7066 to Plaintiffs is "merely vindictive" because "plaintiffs are not punished in proportion to their culpability but to their wealth," given that "equally guilty but wealthier felons are offered access to the ballot while these plaintiffs continue to be disenfranchised." 950 F.3d at 827. This claim is utterly meritless. Once again, felons are not being *punished* when the State merely insists their sentence for committing a felony be carried out. The *Jones* panel offered no explanation for how a State acts "vindictively" when it demands the *exact same* sacrifice from all felons. If a 30-year-old and 80-year-old commit identical crimes with equal culpability and are sentenced to identical prison terms—say, 20 years—could anyone claim that the State acts "vindictively" by requiring both felons to complete their carceral terms despite the virtual certainty that one of them will not be able to do so? Even though

"equally guilty but [*younger*] felons are offered access to the ballot," *id.*, while the older felons suffer what amounts to permanent disenfranchisement?

Fourth, neither the *Jones* panel nor Plaintiffs have identified any "alternative means for effectuating" the State's restorative interests. *Bearden*, 461 U.S. at 667. The *Jones* panel addressed only what it saw as the State's alternative means for effectuating "its interest in debt collection." 950 F.3d at 827. But the State's interests run much deeper than raising revenue. *See Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (lead opinion). As discussed above, it also has retributive and restorative interests in ensuring that felons be punished for their crimes and that the scales of justice are restored to balance in each case. The *Bearden* test favors the State.

II. Amendment 4 and SB-7066 Do Not Impose Taxes Prohibited by the Twenty-Fourth Amendment.

The Twenty-Fourth Amendment provides that citizens' right to vote in federal elections "shall not be denied or abridged by . . . any State by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV, § 1. After concluding that Florida has not "explicitly imposed a poll tax"—because the "financial obligations at issue were imposed as part of a criminal sentence"—the district court held that restitution and fines are *not* "other tax[es]" prohibited by the Amendment, but that court costs and fees *are*. A1105–A1106.

The district court's latter holding is wrong. First, the Twenty-Fourth Amendment does not apply when the right to vote has been constitutionally

forfeited. Second, even if the Twenty-Fourth Amendment applied, financial penalties imposed as part of a *criminal sentence*—whether restitution, fines, or fees—are not unconstitutional taxes.

A. The Twenty-Fourth Amendment Does Not Apply to Amendment 4 and SB-7066.

The district court's first misstep was to apply the Twenty-Fourth Amendment to felon reenfranchisement. Plaintiffs do not have a claim under the Twenty-Fourth Amendment because felons do not have the right to vote and reenfranchisement schemes only *restore* voting rights.

The leading Supreme Court cases addressing poll-tax claims involved taxes imposed on citizens who had not forfeited their right to vote. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, the Supreme Court struck down a poll tax imposed on all citizens of the State who were otherwise eligible to vote. *See id.* at 667–68. Likewise, *Harman v. Forssenius*, 380 U.S. 528 (1965), involved a statute that required all voters either to pay a poll tax or to file a certificate of residency six months before a federal election. *Id.* at 540. In both instances, the State sought to place a tax directly on the right to vote for eligible voters.

Neither Amendment 4 nor SB-7066 denies the right to vote to otherwise qualified voters seeking to exercise a pre-existing right. Rather, they provide requirements for *reenfranchisement*. This distinction is dispositive. Again, *Richardson* stands for the uncontroverted proposition that a State constitutionally

may *permanently* bar felons from voting upon conviction. *See* 418 U.S. at 54–56. And the effect of *Richardson* is plain: because disenfranchised felons can be forever barred from voting, their right to vote, by definition, no longer exists, and any restoration of the franchise to that class is an act of grace. Justice O'Connor, writing for the Ninth Circuit, explained the simple logic of the State's position:

> Plaintiffs' right to vote was not abridged because they failed to pay a poll tax; it was abridged because they were convicted of felonies. Having lost their right to vote, they now have no cognizable Twenty-Fourth Amendment claim until their voting rights are restored. That restoration of their voting rights requires them to pay all debts owed under their criminal sentences does not transform their criminal fines into poll taxes.

See Harvey, 605 F.3d at 1080. The only other circuits that have considered similar challenges have likewise concluded that felons do not have a Twenty-Fourth Amendment claim to challenge reenfranchisement schemes. *See Johnson*, 624 F.3d at 751; *Howard*, 2000 WL 203984, at *2. Rather than confront this reasoning, the district court derisively asserted that the State's argument "makes no sense." A1105. This cavalier dismissal does not withstand scrutiny.

B. Even If the Twenty-Fourth Amendment Applied, Financial Penalties Imposed as Part of Felons' Criminal Sentences Are Not Unconstitutional Taxes.

Even if the Twenty-Fourth Amendment had any bearing here, the district court erred in parsing the different financial obligations imposed as part of felons' criminal sentences. The court considered whether each category of obligation

qualifies as an "other tax" under the Twenty-Fourth Amendment. A1105–A1112. Purporting to follow the "functional approach" outlined in *NFIB v. Sebelius*, 567 U.S. 519, 565 (2012), the court concluded that restitution and fines are *not* taxes, but fees and costs included in a criminal sentence *are*, *see* A1106–A1112. Thus, the court held that the Twenty-Fourth Amendment precludes Florida from conditioning reenfranchisement on the payment of fees and costs included in a felony criminal sentence. A1112–A1113.

The district court's conclusion is erroneous. The court ignored that every financial term of sentence was imposed *as punishment for the conviction of a crime*. The Supreme Court explained in *NFIB* that "[i]n distinguishing penalties from taxes, . . . if the concept of penalty means anything, it means punishment for an unlawful act or omission." 567 U.S. at 567 (quotation omitted); *see also United States v. La Franca*, 282 U.S. 568, 572 (1931) (explaining that "a 'penalty' . . . is an exaction imposed by statute as punishment for an unlawful act"). Court fees and costs are terms of criminal sentences just the same as prison terms, parole, fines, and restitution, and are the necessary consequences of a conviction much like the loss of the right to vote. Indeed, court fees and costs are materially indistinguishable from mandatory minimum fines, as defendants can be sure that two things will happen if they are convicted of a felony: they will lose several civil rights, including the right to vote, and they will be required to pay court costs and fees.

The punitive nature of court fees and costs is also applicable to defendants who plead no contest and/or have adjudication withheld. They, like those who plead guilty or are convicted by a jury or judge, are required to pay court fees and costs because they are subject to punishment by the State. Under Florida law, "[a] plea of nolo contendere admits the facts for the purpose of the pending prosecution" and is "equivalent to a guilty plea only insofar as it gives the court the power to punish." *Vinson v. State*, 345 So. 2d 711, 713, 715 (Fla. 1977). And a judge cannot withhold adjudication for a felony without placing a defendant on probation. *See* Fla. Stat. § 948.01(2); *see also State v. Tribble*, 984 So. 2d 639, 640–41 (Fla. Dist. Ct. App. 2008) ("[O]nce any required pre-sentencing procedures are concluded, the options available to the trial court are either to adjudge the defendant guilty and order confinement or to withhold adjudication and place the defendant on probation."). Defendants who are acquitted, by contrast, do *not* pay fees and costs. *See* Fla. Stat. § 939.06. Court fees and costs are thus tied to culpability and are punitive.

Florida case law also confirms that court fees and costs are penalties. In Florida, costs of prosecution—a type of fee routinely assessed in criminal sentences, *see, e.g.*, A891–A893—constitute a *criminal sanction* for double jeopardy purposes, because such costs are applied "[i]n all criminal and violation-of-probation or community-control cases," *Martinez v. State*, 91 So. 3d 878, 880 (Fla. Dist. Ct. App. 2012) (quoting Fla. Stat. § 938.27(1)), and are "ordinarily . . . imposed during

the sentencing process," *id*. And a trial court withholding adjudication in Florida may "require the payment of costs of prosecution as a condition of probation" because "[t]he payment of the costs of prosecution, like the payment of a fine, can have a rehabilitative effect on the defendant and such costs arise from the commission of an offense and are therefore reasonably related to it." *Clinger v. State*, 533 So.2d 315, 316 (Fla. Dist. Ct. App. 1988); *see also* Fla. Stat. § 938.27(3) (requiring the payment of costs of prosecution as a condition of probation or community control). A trial court withholding adjudication can also exercise its discretion to impose a criminal fine. *See Clinger*, 533 So. 2d at 316; Fla. Stat. § 948.011. This further refutes the district court's contention that fines are distinguishable from court fees and costs because "fines ordinarily are imposed only on those who are adjudged guilty." A1109.

The *Martinez* court also noted that while "[p]ayment of costs of prosecution may be enforced by, among other methods, reducing them to a civil judgment," "the fact that one method for enforcing these costs is by civil means does not alter the criminal nature of the sanction." 91 So. 3d at 880 n.2. The district court thus erred in asserting that such fees are taxes because they "are ordinarily collected not through the criminal-justice system but in the same way as civil debts or other taxes owed to the government." A1111.

Moreover, no matter the amount or who collects the proceeds, court costs and

fees serve the same "regulation and punishment" ends as do fines and restitution. *See Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922). The district court partially rested its conclusion that court fees and cost are taxes on the uniformity of some of these obligations. A1111. But it cited no authority for the proposition that financial terms of sentence must be *proportional* to wrongdoing to qualify as penalties. And even uniform costs are proportional because the State seeks to place part of the cost to society in determining guilt on those who are convicted of felonies. That the State has set a uniform amount makes it no less a penalty. Indeed, the district court took no issue with "minimum mandatory fines." A1108. Further, the fact that court fees and costs are used to defray the costs of operating the criminal justice system does not transform them into taxes. Indeed, the proceeds of criminal fines are often applied to the same fund. *See, e.g.*, Fla. Stat. § 142.01(1) (designating several criminal fines and court costs to a fund for "performing court-related functions"). The only difference is that a judge does not have discretion over the imposition of court fees and costs but does have a say in imposing *some*—but not all—fines. *See* A1151 (acknowledging that some felony offenses carry mandatory fines). Thus, fines and court costs and fees are materially indistinguishable.

In all, if these fees are legitimate portions of a felon's criminal sentence, there is no conceptual difference between such fees and fines or restitution, which the district court and the circuits have uniformly ruled do not violate the Twenty-Fourth

Amendment. *See* A1107–A1109; *Johnson*, 624 F.3d at 751; *Harvey*, 605 F.3d at 1080. In *Johnson*, the Sixth Circuit considered the requirement that felons pay criminal restitution (as well as child support obligations) before regaining the right to vote and determined that such requirements did not "qualify as the sort of taxes the Amendment seeks to prohibit" because "[u]nlike poll taxes, restitution and child support represent legal financial obligations Plaintiffs themselves incurred." 624 F.3d at 751. Here, just as in *Johnson*, the State did not force felons to incur the fees they owe—they were imposed as part of the sentence for a felony conviction. Indeed, the fees and costs required here are much more tightly connected to felons' criminal conduct than the child support payments at issue in *Johnson*. On no conceivable reading of the Twenty-Fourth Amendment can the penalties assessed in court fees and costs be a "tax."

Finally, Applicants wrongly characterize Florida law as requiring payment of a "fee" for eligibility to vote. That does not accurately reflect either Amendment 4 or SB-7066, both of which require full compliance with criminal sentences before a felon may return to the electorate. Indeed, felons who have not completed their terms of imprisonment but have paid their financial terms are just as ineligible for restoration of their rights as those who have not paid the financial terms but have fully served their carceral terms.

III. Florida's Reenfranchisement Scheme Comports With the Due Process Clause.

Plaintiffs also argued before the district court that even if Amendment 4 and SB-7066 could constitutionally require felons to pay the financial terms of their sentences, the method by which the State has implemented the requirement violates the Due Process Clause because it is unconstitutionally vague and denies procedural due process. In a cryptic portion of its opinion, the district court stated that it thought the Plaintiffs' arguments "carry considerable force," but it did not rule on the ultimate merits of Plaintiffs' due process claims. A1129. Rather, the court noted that the advisory-opinion procedure and immunity from criminal prosecution that it ordered as remedies for Plaintiffs' wealth-discrimination claim would likewise "satisfy due process." A1131. A ruling on Plaintiffs' due-process claim was not necessary, the court noted, because "[e]ven in the absence of a ruling [on that claim], the same requirements would be included in the remedy for the constitutional violation addressed" in the court's wealth-discrimination analysis. A1132. Moreover, although the district court acknowledged general vagueness principles, it did not explain their application to the State's implementation of its reenfranchisement scheme. *See* A1130. The court also cited the framework governing procedural due process claims, *see* A1131 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)), but it did not attempt to analyze the *Mathews* factors.

To the extent the district court's opinion endorsed Plaintiffs' due process claims, its rulings are erroneous. A court finding a constitutional violation "is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.' " *Dayton Bd. Of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977) (quoting *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)). As the State demonstrated above, Amendment 4 and SB-7066 do not violate the Equal Protection Clause. And the procedures the district court imposed on the State were designed to remedy its faulty wealth-discrimination holding. If the State can rationally demand that *all* felons—including those unable to pay—satisfy all financial aspects of their sentences, then the State need not show the precise amount owed or that any individual felon is able to pay.

The due process claims that the district court found to carry force related to felons whose financial terms of sentence "are unknown and cannot be determined with diligence." A1151. But again, this concern was stated in the context of a wealth-discrimination holding that makes voting eligibility turn on a comparison between the amount of financial terms of sentence outstanding and a felon's financial means. To reiterate, concerns about the precise amount of a felon's outstanding financial obligations simply do not attend a system in which the sole question for eligibility is whether *any* amount remains outstanding. And *every* member of the wealth-

discrimination subclass certified by the district court *knows* that he has "unpaid financial obligations that [he] asserts [he] is genuinely unable to pay." A669.

Moreover, the district court's reasoning rests on a mistaken premise: that the State has not informed felons of their financial obligations. To the contrary, the State tells every felon the terms of his punishment, including any financial terms, *upon conviction*. And the first-dollar principle facilitates the ability of felons to determine what they owe by automatically crediting all payments toward completing the felon's financial terms of sentence for purposes of voting. The district court offered no legal basis for charging *the State* with the responsibility of providing felons with information about their own unfulfilled criminal sentences and any payments that they themselves have made toward them.[2]

Indeed, by the district court's own account, the portion of eligible felons for whom the remedial order would provide additional safeguards—once its erroneous wealth-discrimination holding is swept away—is small. If the district court is correct that "the overwhelming majority of felons who have not paid their [financial terms of sentence] in full, but who are otherwise eligible to vote, are genuinely unable to pay the required amount," A1075–A1076, then it follows that the vast majority of felons are *ineligible* under Amendment 4 and SB-7066. They therefore face no

[2] Moving forward, the State will also provide felons with information about the financial terms of sentence upon release from prison, parole, probation, and community control. *See* Fla. Stat. §§ 944.705(7)(a)(1); 947.24(3); 948.041.

ambiguity about whether they can register, and they face *zero* risk of erroneous deprivation if the State prevails on the wealth-discrimination claim.

What is more, felons are not bereft of options for seeking to learn the contents of sentences they have not previously kept track of themselves. Felons convicted in Florida courts (as opposed to federal or out-of-state courts) can access their sentencing records directly through the County Clerks' office, which retains the records for felony convictions for seventy-five years. *See* A868. One of the clerk's primary duties is to monitor and manage the collection of financial obligations included in criminal sentences. A869. Thus, clerks are typically able to answer felons' questions and provide information regarding their financial terms over the phone, on the internet, or in person. A869. One County Clerk official testified that most questions about financial obligations, which are typically related to more recent convictions, can be answered within a few minutes. A857. Clerks can email sentencing documents stored on their electronic system—which are also available online—or can provide the same information contained in paper records for older convictions. A857–A858. One public defender testified that in a sampling of over 2,000 cases in Miami-Dade County, sentencing orders for all but five or six cases—mostly concerning decades-old convictions—could be obtained. A932. While the district court emphasized one case in which a County Clerk's office spent 12 to 15 hours assessing what one Plaintiff owed, *see* A1086, trial testimony reveals that his

case was unusually complicated—involving over ten felony convictions over several decades—and not typical, A867–A868.

Notably, from the time when SB-7066 became effective on July 1, 2019 until the time of trial in April 2020 (a timeframe of approximately ten months), the Florida Department of State's General Counsel's Office had received only about thirty inquiries from members of the public or Supervisors of Elections concerning Florida's reenfranchisement scheme in general, and only a handful were related to voter eligibility with regards to financial terms of sentence. *See* A950. This does not bespeak widespread confusion about whether and in what amounts financial obligations are owed under Amendment 4 and SB-7066. And to the extent a felon has any residual uncertainty about his eligibility to vote, he can make *proper* use of the State's existing advisory opinion process and ask for a *legal* determination on whether he would violate the laws against false registration and fraudulent voting by registering and voting given the facts and circumstances attendant to his case. *See* A997. Indeed, the Division of Elections makes the rules for requesting an advisory opinion available online. *See* Fla. Admin. Code R. 1S-2.010, *available at* https://bit.ly/2Zl5hrJ.

But even as applied to the small group of felons who are unsure whether they owe any financial obligations, Plaintiffs' vagueness and procedural due process claims are meritless.

First, the vagueness doctrine applies only to the clarity of laws carrying criminal or civil penalties, *see, e.g.*, *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1229 (11th Cir. 1982), and SB-7066 involves no penalizing enforcement mechanisms whatsoever, *see* Fla. Stat. § 98.0751. Plaintiffs' vagueness claims thus implicate only the State's criminal laws regarding illegal registration and voting. And in evaluating vagueness challenges, courts apply the two-part standard established in *Kolender v. Lawson*, 461 U.S. 352 (1983), which "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 357. The relevant statutes here—pertaining to the risk of prosecution for registering and voting when ineligible under Amendment 4 and SB-7066—are facially unambiguous. Indeed, Florida law criminalizes only "*willfully* submit[ting] any false voter registration information," Fla. Stat. § 104.011(2) (emphasis added), and punishes "[w]hoever, *knowing* he or she is not a qualified elector, *willfully* votes in any election." Fla. Stat. § 104.15 (emphases added).

As noted above, the district court focused its vagueness doctrine musings on felons who cannot ascertain whether they are eligible to register and vote because they are uncertain whether they have fulfilled their financial obligations as required for eligibility under Amendment 4 and SB-7066. In other words, these felons are

uncertain not about the *meaning* of the provisions of the relevant criminal statutes, but about their *factual* circumstances relating to eligibility. This kind of felon-specific factual uncertainty does not implicate the vagueness doctrine at all, for the State's sole constitutional obligation is to ensure that its criminal statutes provide felons with "clear standards regarding the conduct [the legislature] intended to prohibit." *United States v. Biro*, 143 F.3d 1421, 1426 (11th Cir. 1998); *see also United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32–33 (1963) ("[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language."). And the State's relevant statutes indisputably provide that clarity. *See* A1130. A felon can ascertain from the State's criminal statutes exactly what conduct is prohibited: willfully submitting false registration information and/or voting when he knows he is ineligible. Whether that felon can determine his eligibility (i.e., that he has completed his financial terms of sentence) without additional help from the State is simply not relevant to whether the criminal statutes themselves give him sufficient notice as to the conduct they proscribe. The district court's vagueness concerns, to the extent it actually had any, were thus unfounded.

Furthermore, "[t]he constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of mens rea." *United States v. Waymer,* 55 F.3d 564, 568 (11th Cir. 1995) (citing *Colautti v.*

Franklin, 439 U.S. 379, 395 (1979)). The Supreme Court has "made clear that scienter requirements alleviate vagueness concerns," *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007), and that it does so for both prongs of the vagueness inquiry, *see id.* at 149–50. A "requirement that [an] act must be willful or purposeful . . . . relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware." *United States v. Conner*, 752 F.2d 566, 574 (11th Cir. 1985) (quotation omitted)). Likewise, a scienter requirement mitigates concerns for "arbitrary or discriminatory enforcement" because it "narrow[s] the scope of the [law's] prohibition and limit[s] prosecutorial discretion." *Gonzales*, 550 U.S. at 150. Thus, the State's laws prohibiting ineligible registration and voting check this box too, as they require that the felon "*willfully* submit any false voter registration information," Fla. Stat. § 104.011(2) (emphasis added), or "*willfully* vote[] in any election" "*knowing* he or she is not a qualified elector," Fla. Stat. § 104.15 (emphases added).

The district court nonetheless maintained that the State's registration form will have a deterrent effect because, while the form warns registrants that it is a criminal offense to provide a false statement, it "omits the statutory requirement for willfulness." A1101. That has nothing to do with whether the criminal statutes are unconstitutionally vague. Indeed, the common law has long embraced the settled presumption "that every person kn[o]w[s] the law." *Cheek v. United States*,

498 U.S. 192, 199 (1991); *see also United States v. Duran*, 596 F.3d 1283, 1291 (11th Cir. 2010).

Plaintiffs' procedural due process claim fares no better than their vagueness claim. While the district court did not actually conduct a due process analysis, it appeared to find force in Plaintiffs' argument that "the State has provided no constitutionally adequate procedure for determining whether an individual meets the standards" for regaining eligibility to vote. A1129. But this argument suffers from the same underlying analytical flaw that plagues Plaintiffs' arguments in this case generally: it proceeds from the premise that Amendment 4 and SB-7066 deprive felons of the right to vote. Indeed, this must be a premise of Plaintiffs' argument, for the Due Process Clause provides that a State may not "*deprive* any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. (emphasis added.) Here, the deprivation of Plaintiffs' right to vote took place *when they were convicted of their felonies*. Amendment 4 and SB-7066 do not add to that deprivation, but instead provide a means for Plaintiffs and other felons to *restore* their right to vote. Therefore, the only way the State could violate due process would be if it *removed* felons from the rolls *after* they had registered without providing them with adequate procedural protections. But as the district court itself recognized, *see* A1130–1031, the State's removal process easily satisfies the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), for it provides for notice to the registered

felon of the basis for potential ineligibility, the right to a pre-removal hearing, and the right to contest the removal de novo in court, *see* Fla. Stat. § 98.075(7)(a); *id.* § 98.0755.

Finally, even if Amendment 4 and SB-7066 violate the Due Process Clause, the district court's remedy—imposing an intricate advisory-opinion process, specifying the exact content of the form that must be provided to felons to request the opinion, *see* A1159—exceeded its judicial authority. "The power that the Supremacy Clause grants federal courts that undertake judicial review of state statutes is limited to refusing to apply state rules of decision that they believe are unconstitutional." *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1288 (11th Cir. 2019) (Tjoflat, J., dissenting) (citation omitted). "That power does not extend . . . to prescribing *new* rules of decision on the state's behalf." *Id.* Principles of federalism demand as much. *See Rizzo v. Goode*, 423 U.S. 362, 379–80 (1976).

The district court's injunction violates these limitations by rewriting Florida's advisory opinion process, even though Florida law places that responsibility in the Department of State, *see* Fla. Stat. § 106.23(2), and the Secretary has promulgated regulations specifying the content of such requests, *see* Fla. Admin. Code R. 1S-2.010(4), and the time in which the Division of Elections must prepare a written response, *see id.* R. 1S-2.010(5)(a). "[T]he decision to drastically alter [Florida]'s election procedures must rest with the [Florida] Secretary of State and

other elected officials, not the courts." *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020) (per curiam).

The district court also transgressed its authority when it "purport[ed] to advise"—actually, *order*—Florida "on the best means of rendering constitutional its election code," for in the first instance "that decision rests with the sound judgment of the [Florida] Legislature," the Governor, and the Secretary. *Republican Party of Ark. v. Faulkner County*, 49 F.3d 1289, 1301 (8th Cir. 1995); *see also Califano v. Westcott*, 443 U.S. 76, 95 (1979) (Powell, J., concurring in part and dissenting in part) (explaining that it is the "duty and function of the Legislative Branch to review [its law] in light of [the court's] decision and make such changes therein as it deems appropriate"). Amendment 4 and SB-7066 do not violate any provision of the Constitution. But even if they did, the district court should have enjoined the State's officers from violating Plaintiffs' purported constitutional rights and left it to the State in the first instance to devise an adequate remedy.

IV. The Requirement that Felons Complete All Terms of Sentence Is Not Severable from the Remainder of Amendment 4.

Even if Plaintiffs succeed on the merits of their equal-protection and Twenty-Fourth Amendment claims, they cannot show that they are entitled to the district court's permanent injunction. Under Florida's settled severability principles, the condition that felons complete "all terms of sentence" to qualify for

reenfranchisement cannot be severed from Amendment 4, thus requiring the wholesale invalidation of Amendment 4 if Plaintiffs are correct on the merits.

Severability of state legislative provisions is "a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam). The Florida test for the severability of legislative enactments is as follows:

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions 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, (4) an act complete in itself remains after the invalid provisions are stricken.

Smith v. Dep't of Ins., 507 So. 2d 1080, 1089 (Fla. 1987) (quotation omitted). This same test applies to constitutional amendments adopted by Florida voters. *See Ray v. Mortham*, 742 So. 2d 1276, 1281 (Fla. 1999).

The district court's injunction fails every prong of this test because the condition that felons complete "all terms of sentence" is an essential part of the constitutional bargain and inextricably related to the benefit conferred by Amendment 4. To be clear, the State does not believe that Amendment 4 violates the Constitution. But after determining that Florida's reenfranchisement scheme was unconstitutional as applied to felons who cannot pay the financial terms of their sentence (and all felons with outstanding fees and costs), the district court

compounded its error by concluding that the Amendment still accomplishes its purpose and that the People would have adopted it even after *suspending* the "all terms of sentence" requirement for this group, which the court found constitutes the *overwhelming majority* of otherwise ineligible felons. *See* A1131–A1135. This conclusion is patently wrong.

First, the district court's remedy does not actually *sever* any part of the Florida Constitution but rather effectively *writes additional language into it*. If the district court's decision is allowed to stand, Florida's Constitution effectively will read as follows, with the judicially-created language bolded:

> Except as provided in subsection (b) of this section, any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation**; provided that payment of court fees and costs shall not be required; and provided further that payment of the financial terms of sentence shall not be required for those who are unable to pay such obligations**.

Rewriting Amendment 4 to include these exceptions contravenes Florida law. As the Florida Supreme Court has made clear, a court may not "read [an element] into a statute that plainly lacks one" due to "Florida's strong adherence to a strict separation of powers doctrine." *Schmitt v. State*, 590 So. 2d 404, 414 (Fla. 1991) (citing FLA. CONST. art. II, § 3); *see also Westphal v. City of St. Petersburg*, 194 So. 3d 311, 313–14 (Fla. 2016); *Richardson v. Richardson*, 766 So. 2d 1036, 1042 (Fla. 2000).

Additionally, the Florida Supreme Court has explained that courts should not "legislate and sever provisions that would effectively expand the scope of the statute's intended breadth." *State v. Catalano*, 104 So. 3d 1069, 1081 (Fla. 2012). By partially enjoining the requirement that felons complete all terms of their sentences, the injunction broadens Amendment 4 to provide automatic restoration of voting rights to a larger segment of the felon population than the People of Florida intended to benefit.

Second, the district court erred in failing to apply Florida's well-established four-part test for evaluating severability. *See Smith*, 507 So. 2d at 1089. Instead, the court determined that the "critical issue is whether, if the unconstitutional applications of the amendment are enjoined, it is still reasonable to apply the remainder of the amendment, and whether, if the voters had known the amendment would be applied only in this manner, they still would have approved it." A1142. But the People's intent covers only *one prong* of the test, and the origins of the court's reasonability standard for applying the remainder of Amendment 4 is a mystery.

What is more, the district court's evaluation of the People's intent is clearly erroneous. The court's finding that "voters would have approved Amendment 4 by more than the required 60% had they known it would be applied in the manner required by [its] order," A1142, is owed no deference because severability is a

question of law rather than fact. "[T]he touchstone for [severability analysis] is legislative intent." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006); *see United States v. Booker*, 543 U.S. 220, 246 (2005). As such, severability is "an exercise in statutory interpretation." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring); *see Dorchy v. Kansas*, 264 U.S. 286, 290 (1924); *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1555 (D.C. Cir. 1985); *see also Lester v. United States*, 921 F.3d 1306, 1314 (11th Cir.2019) (W. Pryor, J., respecting the denial of rehearing en banc). And exercises in statutory interpretation involve questions of law rather than fact. *See United States v. McLean*, 802 F.3d 1228, 1246 (11th Cir. 2015). Therefore, this Court must review de novo the district court's conclusions regarding the People of Florida's intentions in adopting Amendment 4. *See, e.g.*, *United States v. Hastie*, 854 F.3d 1298, 1301 (11th Cir. 2017).

In any event, the district court's finding is clearly erroneous because the injunction, which eliminates a key requirement of Amendment 4 for *most* felons, guts its main purpose. It is not simply *unclear* whether the People would have adopted the district court's version of Amendment 4, as framed above; it is wholly *implausible* that they would have done so. *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1269 n.16 (11th Cir. 2005). Amendment 4 was a historic measure, enacted after nearly two centuries of broad prohibitions on felons voting

in Florida. In relaxing this prohibition, the People made clear their intent that felons must pay their debt to society *in full* before being extended eligibility to vote. Had the People known that they *could not* insist on this requirement in the *overwhelming majority* of cases it is highly unlikely that they would have approved Amendment 4.

The district court's contention that the payment of financial terms was not "critical to a voter's decision," *see* A1145, is belied not only by common sense, but by the Florida Supreme Court's holding that "all terms of sentence" unambiguously includes *both* durational *and* financial aspects of criminal punishment, and that this interpretation accorded with the "consistent message" disseminated to the electorate by "the ACLU of Florida and other organizations along with the [Amendment's] Sponsor . . . before and after Amendment 4's adoption." *Implementation of Amendment 4*, 288 So. 3d at 1077.

Indeed, as written, 64.55% of voters supported Amendment 4—a mere 4.55% above the 60% threshold necessary under the constitutional amendment initiative process. *See* Fla. Const. art. XI, § 5(e). There is no basis to conclude that Amendment 4 would have cleared the 60% threshold with one of its key provisions severely compromised. And supporters of Amendment 4 *knew* that felon reenfranchisement "polls higher" in Florida when payment of financial punishment was required and that there would be a "harder fight to win 60% + 1% approval" without that requirement. *See* A748. Despite this, the district court concluded that

the People would not have rejected the court's permissive version of Amendment 4, finding it instead "far more likely . . . that voters would have adhered to the more generous spirit that led to the passage of the amendment." A1145–A1146. But rewriting the plain text of a provision—even to avoid an unconstitutional result—based on the court's measure of the public's "generous spirit" is the *exact* type of judicial legislation the Florida Supreme Court has routinely rejected. *See Westphal*, 194 So. 3d at 313–14.

Thus, if this Court finds the challenged applications of Amendment 4 and SB-7066 unconstitutional, it should invalidate Amendment 4 in its entirety, or, at the very least, certify the question to the Florida Supreme Court.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Dated: July 20, 2020

Respectfully submitted,

Joseph W. Jacquot
Nicholas A. Primrose
Joshua E. Pratt
Executive Office of the Governor
400 S. Monroe Street, PL-5
Tallahassee, FL 32399
Telephone: (850) 717-9310
Fax: (850) 488-9810
joe.jacquot@eog.myflorida.com
nicholas.primrose@eog.myflorida.com
joshua.pratt@eog.myflorida.com

Bradley R. McVay
Ashley E. Davis
Florida Department of State
R.A. Gray Building Suite, 100
500 S. Bronough Street
Tallahassee, FL 32399
Phone: (850) 245-6536
Fax: (850) 245-6127
brad.mcvay @dos.myflorida.com
ashley.davis@dos.myflorida.com

s/ Charles J. Cooper
Charles J. Cooper
Peter A. Patterson
Steven J. Lindsay
Shelby L. Baird
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9601
Fax: (202) 220-9601
ccooper@cooperkirk.com
ppatterson@cooperkirk.com
slindsay@cooperkirk.com
sbaird@cooperkirk.com

Counsel for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in the Court's order dated July 6, 2020, because it contains 16,115 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and 11th CIR. R. 32-4.

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: July 20, 2020

s/ Charles J. Cooper
Charles J. Cooper
Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

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 July 20, 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.

Dated: July 20, 2020

s/ Charles J. Cooper
Charles J. Cooper
Counsel for Defendants-Appellants