No. 20-12003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Kelvin Leon Jones, *et al.*,
Plaintiffs-Appellees,

v.

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

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

EN BANC BRIEF OF *RAYSOR* APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions, Statutes, and Rules

Other Authorities

STATEMENT OF THE CASE

I. Procedural History

In 2018 Florida voters ended permanent disenfranchisement for those with prior felony convictions[1] by adopting Amendment 4, which automatically reenfranchises persons "upon completion of all terms of sentence including parole or probation." Fla. Const. art. VI, § 4. In 2019, the State enacted SB7066, which defined that phrase to require payment of all legal financial obligations ("LFOs") ordered within the four corners of the sentencing document—including fines, restitution, costs, and fees—regardless of whether those financial obligations were converted by the sentencing judge to civil liens. Fla. Stat. § 98.0751(2).

Appellees filed suit in cases consolidated in *Jones v. DeSantis*, No. 4:19-cv-00300. The *Raysor* Appellees[2] alleged, *inter alia*, that Florida's pay-to-vote scheme discriminates against those unable to afford their LFOs in violation of the Fourteenth Amendment, denies the right to vote for failure to pay a "poll tax or other tax" in violation of the Twenty-Fourth Amendment, and—given the State's inability to

[1] Amendment 4 excludes those convicted of murder or a felony sexual offense. When Appellees refer to felony convictions, they exclude murder or felony sexual offense convictions.

[2] The "*Raysor* Appellees" include Plaintiffs Raysor, Sherrill, and Hoffman, who are certified class representatives.

determine what must be paid to vote—violates procedural due process and is void for vagueness. A1036-37.

The district court granted a preliminary injunction with respect to Appellees' wealth discrimination claim. A476-78. The State appealed. Doc-219. A panel of this Court unanimously affirmed the preliminary injunction, concluding that SB7066 unconstitutionally discriminates on the basis of wealth, and rejecting the State's severability arguments. *Jones v. DeSantis*, 950 F.3d 795 (11th Cir. 2020).

The district court granted the *Raysor* Plaintiffs' motion for class certification as to their poll tax and wealth discrimination claims. A668-69. Beginning April 27, the district court held an eight-day bench trial, hearing testimony from plaintiffs, county supervisors of elections, county clerks of courts' employees, public defenders, the Florida Division of Elections ("FLDOE") Director, her assistant director, and six expert witnesses, and reviewing over 10,000 pages of evidence.

Following *Jones*, the district court concluded that SB7066's pay-to-vote system fails heightened scrutiny by erecting a wealth barrier to rights restoration. A1072. Further, the court concluded that the pay-to-vote system is irrational as applied to those unable to pay. A1103-1105. In addition, the court concluded that the State's implementation of the pay-to-vote system, riddled with intractable administrative problems, violates procedural due process and is unconstitutionally vague. A1129-32, 1151 ("The requirement to pay, as a condition of voting, amounts

that are unknown and cannot be determined with diligence is unconstitutional."). Finally, the court concluded that the fees and costs assessed by Florida—but not fines and restitution—constitute "other tax[es]" under the Twenty-Fourth Amendment. A1105-13.

The district court relied on the State's existing processes to remedy these violations. It ordered a rebuttable presumption of inability to pay where the state had already made such a determination by appointing counsel for the person's criminal proceedings or converting LFOs to civil liens. A1154-55. And, at the State's invitation, the court directed FLDOE to allow voters to seek an advisory opinion to determine the amount needed to pay to vote, if any, and ordered that if the State were unable to make that determination within 21 days, the requestor could register and vote with a safe harbor from referral for prosecution. A1146-47, 1152-53.

II. Factual Background

A. *Raysor* Plaintiffs

The *Raysor* Plaintiffs—Bonnie Raysor, Diane Sherill, and Lee Hoffman—are ineligible to vote solely because they are unable to pay their disqualifying LFOs. A1057-58. Ms. Raysor and Mr. Hoffman cannot even determine *how much* they must pay to vote because the State cannot determine which of their LFOs relate to their prior felony convictions and which to non-disqualifying misdemeanors. Doc-98-16; Doc-98-18. The *Raysor* Plaintiffs are registered to vote pursuant to the district

court's preliminary injunction. Ms. Sherrill voted in the March 2020 Presidential Preference Primary.[3]

B. Florida's Process for Rights Restoration

Prior to Amendment 4, the only avenue for rights restoration was through clemency. Fla. Const. art. IV, § 8(a). The Governor has "unfettered discretion to deny clemency at any time, for any reason." Fla. R. Exec. Clemency 4. The clemency process is slow: applicants must wait at least five years after completion of supervision to apply and many years more before their application is processed and decided. *Id.* 9(A), 10(A); A428. Success is exceedingly rare. *Hand v. Scott*, 285 F. Supp. 3d 1289, 1310 (N.D. Fla. 2018), *vacated on other grounds sub nom. Hand v. DeSantis*, 946 F.3d 1272 (11th Cir. 2020); Doc-349-2 (Clemency Data).

Floridians must affirm their eligibility in order to register to vote. Fla. Stat. § 97.041(3). If an application is complete and corresponds to an actual person, the county Supervisors of Elections ("SOEs") places the voter on the rolls. Doc-152-94 at 4; Doc-152-24 at 22.

FLDOE is responsible for identifying registrants with felony convictions whose voting rights have not been restored. Fla. Stat. § 98.075(5). If FLDOE finds "credible and reliable information" that a voter has been convicted of a felony and

[3] Ms. Raysor is a registered Republican, and Mr. Hoffman is registered as unaffiliated, so neither voted in the March primary.

has not had her rights restored, it must provide notice and supporting documentation to the SOE. *Id*. If the SOEs agree it is "credible and reliable," they begin the removal process by notifying the voter. Fla. Stat. § 98.075(5), (7). If the voter does not respond within 30 days, she is removed from the rolls. *Id.* § 98.075(7)(a)(3). A voter can challenge the determination of ineligibility, including by requesting a hearing before the SOE. *Id.* § 98.075(7)(a)(5).

C. The State's Inability to Administer its Pay-to-Vote System

The district court found that "[t]he State has shown a staggering inability to administer the pay-to-vote system." A1077.

As of trial, FLDOE had identified more than 85,000 registered voters with felony convictions due to be screened for eligibility, primarily for LFOs. Trial Transcript ("Tr.") 1298-1300, 1421. Although the State has been regularly screening those with murder or sexual offenses and those in custody or under supervision, FLDOE has not verified the ineligibility of a single registrant outside those categories. *Id.* The State will not finish screening these existing registrations until 2026 at the earliest. *Id.*; A1099. This timeline does not account for new registrations expected prior to the presidential election or the additional time required to complete the manual research necessary to screen for LFOs. A1098-99. The State has not taken any steps to prevent these voters from participating in elections since either

Amendment 4 or SB7066 went into effect, nor will it be able to do so for the November election.

The State tried and failed to determine the disqualifying LFOs of the seventeen individual plaintiffs. Tr. 1313-14. No one—not FLDOE, the SOEs, clerks of courts, nor voters themselves—has access to reliable data on disqualifying LFOs. There is no statewide data source that tracks LFOs. Tr. 908-09; Doc-351-18 at 5. Nor is there any single source that collects such information for federal and out-of-state convictions. Doc-152-93 at 186-87. Records, where they exist, are conflicting, incomplete, or inconsistent. Tr. 185-87; Doc-353-26 at 21; Doc-153-4 at 4-6. In some cases, records of LFOs no longer exist. Tr. 342-44, 481-83; Doc-359-27. As such, many citizens do not know how much they must pay to vote. Doc-360-47 at 8-9. The State cannot and will not tell citizens or SOEs which LFOs are disqualifying, nor what citizens must pay to vote. Tr. 474-77, 1313-14; Doc-152-93 at 184.

SB7066 requires full payment of LFOs contained "in the four corners of the sentencing document," and excludes LFOs that accrue after sentencing. Fla. Stat. § 98.0751(2)(a). Sentencing documents vary by county. Doc-152-93 at 183-84. They do not consistently show which amounts were imposed at sentencing. Doc-360-47 at 9-12. They routinely fail to disaggregate disqualifying LFOs from non-disqualifying LFOs, including those imposed for misdemeanors. *Id.*; Tr. 1310. And

FLDOE has no public position on whether restitution ordered after sentencing is disqualifying, a common occurrence. *See, e.g.*, Tr. 1352-57.

The State has not adopted a consistent policy for determining how much has been paid toward disqualifying LFOs, making it impossible for citizens to calculate how much more they must pay to vote. First, the State adhered to what the district court called the "actual-balance" method: taking the original amount of each LFO and deducting principal payments made toward each obligation to determine the amount outstanding. A1081; Tr. 1496-97. Just before trial, and "entirely as a litigation strategy," the State adopted what the district court called the "every-dollar" method: retroactively counting payments made toward *any* obligations related to a citizen's felony convictions as a payment toward the *disqualifying* obligations, even if the payments went to obligations that accrued later (e.g., surcharges on payments or even appellate costs). A1089-90; Doc-343-1 at 3-4; Tr. 1504-06.

The State and counties do not track payments made to private collections agencies, nor restitution paid to victims. A1082; Doc-204 at 111; Doc-167-56 at 2. Restitution is often ordered jointly and severally, such that a person would need to determine what *other* individuals had paid in order to determine her eligibility or what she must pay to vote. Doc-152-5 at 3-4.

A citizen who is unsure of her eligibility has no means of obtaining an eligibility determination without registering and waiting to be flagged for rejection.

Fla. Stat. § 98.075(7)(a)(5). But someone who is unsure *cannot* register because she must affirm, under penalty of perjury, that she *is* eligible. Doc-152-93 at 179-190; Doc-167-3 at 2. This places citizens in an impossible circumstance and at risk of prosecution. A1099-1100. The registration form prominently warns that a false affirmation is a felony. Doc-152-33.

FLDOE refers voters for prosecution for registering or voting while ineligible even where the only evidence of intent is that the person signed the affirmation. Doc-348-25; Doc-286-19. And those voters may be subject to substantial financial penalties even without any finding of guilt. *Id.* The risk that citizens with disqualifying LFOs will face complaints of voter fraud and threats of criminal prosecution is real. Doc-359-45.

Registered voters have a right to a hearing on their eligibility before being removed from the rolls. Fla. Stat. § 98.075(7)(a)(5). But the hearing process is unavailable to citizens who are unsure of their eligibility and decline to risk prosecution by registering to vote. *Id.* Further, FLDOE has not identified *any* ineligible voters under SB7066's LFO requirements yet, so *no* registered voter has had the benefit of this process. SOEs do not have the resources to conduct hundreds or thousands of hearings on voter eligibility with respect to LFOs. A1060; Doc-360-38. Nor do they have the information necessary to make eligibility determinations. *Id.*; Doc-152-24 at 106-107, 109-111.

Finally, the State suggests that Floridians may request an advisory opinion from FLDOE on their eligibility. A993. But the State acknowledges FLDOE may take months—or ultimately decline—to decide whether a citizen is eligible, and asserts FLDOE is under no obligation to inform requestors which LFOs are disqualifying, whether their LFOs have been satisfied, or what amount they must pay to vote. A1000-01; State's Brief ("Br.") at 52-53.

D. Floridians' Inability to Afford Disqualifying LFOs

The mine-run of affected citizens—hundreds of thousands of Floridians, including the individual plaintiffs—are genuinely unable to pay their LFOs. A1047-58; Tr. 61-62, 73-88; Doc-360-34.

Criminal defendants face substantial socioeconomic disadvantages when they enter the criminal justice system. Doc-170-5; Doc-349-5 at 22. A 2015 study found that "incarcerated people had a median annual income of $19,185 [in 2014 dollars] prior to their incarceration, which is 41% less than non-incarcerated people of similar ages." A696 n.22. These citizens' economic situations worsen after conviction—compared to the general population they are less likely to secure employment, earn lower wages on average, and are nearly ten times more likely to experience homelessness. A686-88, 690-91, 697. At the same time, they are burdened with substantial LFOS: over 61 percent of otherwise eligible Floridians owe more than $500, and the majority owe more than $1,000. A686-88, 690-91.

These LFOs are imposed regardless of ability to pay. Fla. Stat. §§ 893.135; 938.05; Doc-357-4.

Florida courts recognize these citizens' inability to pay. In some instances, courts establish payment plans. Doc-152-14. Paying LFOs pursuant to such plans can take decades, if the LFOs are ever fully paid. *See* Fla. Stat. § 28.246; Doc-152-14 at 3 (Plaintiff Raysor's payment plan, based on her ability to pay, will keep her ineligible until 2031). Courts often convert LFOs to civil liens when defendants cannot afford to pay. Fla. Stat. § 938.30(6)-(9); Doc-204 at 94; A430, 445; *Jones*, 950 F.3d at 803. Indeed, the civil lien procedure exists to prevent the unconstitutional punishment of poverty. H.R. Staff Analysis, H.B. 1381, Reg. Sess. (Fla. 1998); *see Hewett v. State*, 613 So.2d 1305, 1306 (Fla. 1993). A civil lien takes the LFO out of the criminal justice system. Doc-170-5 at 7-10. Under SB7066, LFOs remain disqualifying even when converted to civil liens. Fla. Stat. § 98.0751(2)(a)(5)(c).

Legislators acknowledged proper alternatives to SB7066, including exempting civil liens. The legislature considered multiple versions of the bill and chose the most restrictive one. Doc-153-2; Doc-286-13 at 100. SB7066's lead sponsor acknowledged that *all* the proposed versions of the bill complied with Amendment 4. Doc-341 at 4; Doc-286-13 at 100. The legislature knew the LFO requirement would make it practically impossible for election officials, voters, and

civic organizations to determine citizens' eligibility to vote. Doc-286-13 at 91-97; Doc-362-12 at 60.

Before enacting SB7066, the State did not interpret or implement Amendment 4 as requiring payment of LFOs. Tr. 908-10; Doc-356-3; Doc-152-24 at 74-75. Thus, SB7066 provided a safe harbor from prosecution for those who registered during the six-month period between the effective dates of Amendment 4 and SB7066. Fla. Stat. § 104.011(3).

SB7066's alternative remedies are illusory. Both termination of LFOs and conversion to community service are discretionary and the court need not consider ability to pay. Fla. Stat. §§ 98.0751(2)(a)(5)(e)(III); 938.30(2). Termination requires the consent of the payee. *Id.* § 98.0751(2)(a)(5)(e)(II). Conversion of LFOs into community service is rare and nonexistent for certain types of LFOs. Doc-348-15. Even assuming someone had the time and ability to do unpaid work, completing an LFO via community service would takes years because the hourly rate for community service is so low. *See* Fla. Stat. §§ 938.30(2), 318(8)(b); A462-63.

E. Fees and Costs

Fees and costs imposed on criminal defendants produce revenue for the state. A1043, 1111. Fees and costs fund both general and specific governmental functions. Doc-353-43 at 6; Doc-360-47 at 17 n.7. The Florida Constitution requires that the State's courts be self-funding. Fla. Const. art. V, § 14. Clerks must maintain multiple

trusts funded by LFOs. Fla. Stat. §§ 142.01; 213.131. Excess revenue from costs and fees goes into the General Revenue Fund and funds other areas of state government, including those unrelated to criminal justice. Fla. Stat. § 28.37(3)(a); Doc-286-15 at 6. Clerks must prioritize distribution of partial payments to monies earmarked for the State's General Revenue Fund. Fla. Stat. § 28.246(5).

Costs and fees are collected the same way as other taxes and civil debts. Fla. Stat. § 28.246(6). If an LFO remains unpaid 90 days after assessment, clerks are statutorily *required* to refer outstanding amounts to a private collection agent. *Id.*; Doc-286-15 at 7. In seven counties, once debts go to collection, payments can only be made to the collection agency, not to the county clerk. Doc-360-47 at 59-61.

Payment of surcharges, service charges, and other administrative fees is often required to make a payment, access records, or for other administrative activity. Fla. Stat. § 945.31; Fla. Stat. §§ 28.246(5), 28.24(26), 28.246(6). Several counties prohibit partial payments and mandate the payment of interest, collection agency fees, convenience fees, or other debt imposed after sentencing, which precludes making payments only towards the LFOs assessed in the sentencing document. Doc-360-47 at 10-12, 14, 62-63. Several counties charge fees to establish payment plans, make partial payments, or make payments with credit card or online. Fla. Stat. § 28.246(5), Doc-360-47 at 61-63; Doc-152-14 at 13. Others charge a fee even to access LFO records. Doc-360-47 at 12, 16; Doc-204 at 115; Tr. at 229.

Many costs and fees are mandatory. Fla. Stat. §§ 316.061(1); 812.014(2)(c)(7); Doc-286-15 at 6. Twenty-four out of thirty-eight statutorily imposed court costs do not fluctuate based on the severity of the offense or the defendant's level of culpability. Doc-340-1, Doc-340-2. Most fees and costs in Florida are imposed regardless of whether a defendant is adjudicated guilty or adjudication is withheld. Doc-286-19; Fla. Stat. § 938.05; Tr. 286, 288-89, 338-39; A893.

F. Primary Purpose of Amendment 4

Florida voters' primary intent in passing Amendment 4 was to end Florida's system of permanent disenfranchisement. Doc-286-13 at 11-12. Widespread media coverage of Amendment 4 estimated that it would restore voting rights to between 1.2 and 1.6 million citizens in Florida. Doc-286-13 at 31, 53.

Amendment 4's text and ballot summary did not refer to LFOs. *Advisory Op. to the Attorney Gen.*, 215 So.3d 1202 (Fla. 2017). Media reports on Amendment 4 prior to passage rarely included references to LFOs. Doc-286-13 at 10, 44. Few voters understood the nature or extent of LFOs imposed on criminal defendants, or their impact on rights restoration. Doc-402 at 1028, 1086. Most voters did not know LFOs are typically mandatory and imposed regardless of ability to pay. A1145.

SUMMARY OF ARGUMENT

Based upon decades of Supreme Court precedent and factual findings, to which this Court must defer, the district court concluded that Florida's pay-to-vote system makes wealth an electoral standard in violation of the Fourteenth Amendment, conditions the franchise on payments of taxes in violation of the Twenty-Fourth Amendment, and violates due process and is void for vagueness because it frequently conditions voting rights on payments of unknown or unknowable monetary amounts. The district court's injunction should be affirmed.

First, the district court correctly ruled that Florida's pay-to-vote system unconstitutionally makes wealth an electoral standard. The Supreme Court has long held that laws creating a wealth barrier are subject to heightened scrutiny in two contexts: access to the franchise and criminal justice. SB7066 sits at the intersection of those two contexts. The Supreme Court's wealth discrimination jurisprudence mandates the district court's holding. The district court likewise correctly ruled that the pay-to-vote system is irrational because the mine-run of affected Floridians cannot afford to pay, the State's "every-dollar" method of counting payments subverts the State's purported purpose of repaying debt to society, and the State has proven itself unable to administer the system.

Second, the district court correctly concluded that Florida violates the Twenty-Fourth Amendment by denying the right to vote for failure to pay costs and fees that

function as taxes. The Supreme Court has long held that whether a government levy constitutes a tax depends not upon its label but its function. Florida has chosen to fund its criminal justice system, and generate general revenue for the State, by imposing myriad costs and fees upon those who are convicted of felonies, or who have their adjudication of conviction withheld. The State contends that those convicted of felonies are excluded from the Twenty-Fourth Amendment's protections and that costs and fees cannot be taxes because they are imposed as part of the sentence. These arguments ignore the Amendment's plain text; if adopted, would permit states to condition rights restoration upon race, sex, and age without violating the voting rights amendments; and ignore the Supreme Court's functional tax analysis.

Third, the district court correctly concluded that Florida's staggering inability to administer its pay-to-vote system violates procedural due process and renders SB7066 void for vagueness. Sentencing and payment records are frequently incomplete, inconsistent, or missing. LFOs are typically imposed in a way that prevents disaggregating disqualifying and non-disqualifying LFOs. To access the State's process for determining eligibility one must register to vote, but to do so, one must first affirm her eligibility under threat of perjury. This catch-22 deprives eligible voters of the right to vote, deprives others of the information they need to become eligible, and chills participation by threatening prosecution. Due process

requires more than the Kafkaesque options the State provides to potential voters with felony convictions. The State's primary due process response—that most people are too poor to pay so why even tell them what they owe—is stunning. And its primary vagueness response—that only willful violations of registration and voting laws are criminal—misses the point. A person who does not know if she is eligible cannot affirm her eligibility.

Fourth, the district court correctly rejected the State's cynical effort to overturn Amendment 4 by contending that the voters would not have reenfranchised voters if they could not exclude the poor or impose poll taxes. The State's dark view of its own voters is remarkable, and wrong. The district court concluded, based on expert testimony and an extensive factual record, that the voters' overwhelming intent was to end permanent disenfranchisement and that voters would have enacted Amendment 4 without its unconstitutional applications. The State offers no evidence to show that determination was clear error.

This Court's panel and the district court followed binding Supreme Court precedent. The *en banc* Court must do the same and should affirm the district court's injunction.

ARGUMENT

I. Florida Cannot Condition the Right to Vote—or Extend the Punishment of Disenfranchisement—on Ability to Pay.

A. Over Sixty Years of Precedent Establish that Florida's Pay-to-Vote System is Unconstitutional.

Wealth is not ordinarily a suspect class. But the Supreme Court has carved out critical exceptions to safeguard the principle of "equal justice" that lies at the foundation of our democracy. *Griffin v. Illinois*, 351 U.S. 12, 16 (1956). A "[s]tate need not equalize economic conditions," *id.* at 23, but it also cannot run afoul of two key constitutional principles: (1) "The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license." *M.L.B. v. S.L.J.,* 519 U.S. 102, 124 (1996); and (2) "[T]he state may not treat criminal defendants more harshly on account of their poverty." *Jones*, 950 F.3d at 818; *M.L.B.*, 519 U.S. at 120, 124 (citing *Griffin*, 351 U.S. 12 and *Bearden v. Georgia*, 461 U.S. 660 (1983)). Florida's pay-to-vote scheme sits at the intersection of these prohibitions. It is a "misfit in a country dedicated to affording equal justice to all and special privileges to none." *Griffin*, 351 U.S. at 19.

In 1956, the Supreme Court first announced this principle of "equal justice," holding that although a criminal defendant has no constitutional right to an appeal, once the state creates an appellate process, it cannot erect a wealth barrier to access it. *Id.* at 16. In *Harper v. Virginia State Board of Elections*, the Court relied on this

principle to invalidate Virginia's poll tax. 383 U.S. 663, 668 (1966) (citing *Griffin*). In the 60 years since it was announced, "*Griffin*'s principle of 'equal justice' . . . has been applied in numerous other contexts," *Bearden*, 461 U.S. at 664, including to prohibit states from extending punishment solely due to inability to pay, *see id.; Tate v. Short,* 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970). The State cannot escape this long line of precedent: Florida's pay-to-vote scheme unconstitutionally discriminates on the basis of wealth.

1. Voter Qualifications Have No Relation to Wealth.

The Supreme Court has "solidly establish[ed]" that "[t]he basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license." *M.L.B.*, 519 U.S. at 124. Indeed, the rule established in *Harper* controls: "[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." 383 U.S. at 666. *Harper*'s holding is broad and unequivocal: "Voter qualifications have *no relation to wealth* nor to paying or not paying this *or any other tax*." *Id.* (emphasis added); *see also id.* at 667 (holding that "wealth *or* affluence *or* payment of a fee" are impermissible bases for distinguishing between voters) (emphasis added). Yet, under SB7066, which citizens can and cannot vote depends on affluence. *Jones*, 950 F.3d at 827. The only difference between eligible

voters under SB7066 and Plaintiffs is that Plaintiffs have disqualifying LFOs they are unable to pay. "*Harper* demands that we reject such a classification." *Id.*

Moreover, *Harper* directly refutes the State's contention that its holding only applies to those who already have the right to vote. In *Harper*, the parties differed on whether there was any "right [to vote] held by the Virginian electorate generally." Br. at 21; *compare* Appellees' Brief, 1965 WL 115351 at *7, ("Suffrage is not a First Amendment right."), *Harper*, 383 U.S. 663 *with* Appellants' Brief, 1965 WL 130113 at *14 (arguing that the right to vote is a First Amendment right). The Court found the question of whether there was a preexisting right to vote irrelevant:

> [T]he right to vote in state elections is nowhere expressly mentioned. It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment . . . . We do not stop to canvass the relation between voting and political expression. For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause . . . .

Harper, 383 U.S. at 665. Likewise, once the State grants the franchise to people with felony convictions, lines may not be drawn which differentiate between citizens who have "[money] in [their] pocket or nothing at all." *Id.* at 668.

The State argues that *Harper* is "wholly inapplicable" because a person with a felony conviction "has no more right to vote than does a child or a non-citizen." Br. at 21. This analogy proves the point. Eleven states and D.C. extend the right to

vote in primary elections to 17-year-olds if they will be 18 by the general election.[4] Other municipalities extend the right to vote in local elections to 16-year-olds.[5] Under the State's view, these jurisdictions could exclude minors who cannot afford to pay their school lunch balance from this "statutory benefit." Likewise, some localities allow noncitizen residents to vote in certain local elections.[6] Under the State's theory, these localities could extend the right to vote only to noncitizens who pay a poll tax. These examples offend both the logic of *Harper* and our basic democratic sensibilities. The Constitution does not permit such "squalid discrimination." *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring); *see also Johnson v. Governor of Florida*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005) (stating, in the context of rights restoration, "access to the franchise cannot be made to depend on an individual's financial resources").

The State contends that *Richardson v. Ramirez*, 418 U.S. 24 (1974), provides carte blanche to discriminate among those with convictions. Br. at 3. But *Richardson* demonstrates otherwise. 418 U.S. at 56 (remanding Plaintiffs' Equal Protection

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[4] *See* Voter Registration Age Requirements by State, https://www.usa.gov/voter-registration-age-requirements.

[5] *See* NCSL's The Canvass, Nat'l Conf. of State Leg. (March 2016), https://www.ncsl.org/research/elections-and-campaigns/the-canvass-march-2016.aspx.

[6] Kimia Pakdaman, Noncitizen Voting Rights in the United States, Berkley Pub. Pol'y J. 36-27 (Spring 2019), https://drive.google.com/file/d/10AWHc1wccLwsK8hC5D5tVIGomzq6d66p/view.

challenge); *see Hunter v. Underwood*, 471 U.S. 222 (1985) (holding racially discriminatory felony disenfranchisement scheme unconstitutional); *Hobson v. Pow*, 434 F. Supp. 362, 367 (N.D. Ala. 1977) (holding gender discriminatory criminal disenfranchisement scheme unconstitutional). Where a distinct constitutional claim lies—such as wealth discrimination under *Harper*, *Griffin*, and *Bearden*—*Richardson* is irrelevant. Thus, *Shepherd v. Trevino*, which did *not* involve any classification triggering heightened scrutiny, says nothing about the scrutiny that applies here. 575 F.2d 1110 (5th Cir. 1978); *Jones*, 950 at 823-24. That *Shepherd* applied rational basis review "to 'selective . . . reenfranchisement of convicted felons'" generally, Br. at 20, does not insulate selective reenfranchisment based on sex, race, or here, wealth, from heightened scrutiny.

The State invents unanimity among the courts in their favor. In fact, in addition to the district court and the unanimous *Jones* panel, several courts have signaled that a pay-to-vote system is unconstitutional. In *Harvey v. Brewer*, Justice O'Connor cast doubt on the viability of LFO requirements as applied to those unable to pay. 605 F.3d 1067, 1080 (9th Cir. 2010). A district court in Alabama denied a motion to dismiss a nearly identical claim. *Thompson v. Alabama*, 293 F. Supp. 3d 1313, 1332 (M.D. Ala. 2017). And the Second Circuit held that such a law is unlikely to pass muster. *Bynum v. Conn. Comm'n on Forfeited Rights*, 410 F.2d 173, 176 (2d Cir. 1969). The only two cases supporting the State's position—*Johnson v.*

Bredesen, 624 F.3d 742 (6th Cir. 2010), and *Madison v. State*, 163 P.3d 757 (Wash. 2007)—are poorly reasoned split decisions that defy Supreme Court precedent. *Bredesen* incorrectly assumed that *Bearden* involved a fundamental right but that rights restoration does not. 624 F.3d at 748-49. But, like rights restoration, probation is a matter of grace. *Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935). Likewise, *Madison* erred in assuming that *Richardson* insulates felony disenfranchisement from any constitutional review. 163 P.3d at 768.

The State's additional attempts to distinguish *Harper* are unpersuasive. The State argues that SB7066 does not draw wealth-based lines because its "requirements apply to felons regardless of the terms of sentence they must complete or their personal capacity to do so." Br. at 22. This makes no sense. SB7066 *specifically* identifies LFOs as terms that must be completed to vote. Fla. Stat. § 98.0751(2)(a)(5). And the poll tax in *Harper* was imposed "regardless of [a citizen's] personal capacity to [pay it]," Br. at 22, but that did not make it "wealth-neutral." Insisting that laws requiring payment to access a state-controlled benefit are "wealth-neutral" elevates form over reality. *See Griffin*, 351 U.S. at 23 (Frankfurter, J., concurring) ("It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal.").

The State next attempts to distinguish *Harper* because it "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." Br. at 22. Wealth was not the *sole* criterion for voting in *Harper*—Virginia had residency, citizenship, age, and registration restrictions like all other states. But it *was* the sole barrier for the voters in *Harper* as it is the sole barrier for Plaintiffs here. If Plaintiff Raysor had $3,810 dollars[7] to spare today, she could vote in the next election. She does not, so she cannot.

Nor was the poll tax itself inherently "arbitrary." Br. at 22. The Supreme Court took no issue with the imposition of the poll tax as a common means of revenue generation (in Virginia, the revenue went to public schools); instead it held that the State "introduce[d] a capricious or irrelevant factor" by making payment of the tax "a measure of the voter's qualifications." *Harper*, 383 U.S. at 668. Similarly, here, the constitutional problem is not that Florida imposes financial penalties upon criminal conviction;[8] the constitutional problem is that SB7066 makes payment of those financial penalties an electoral standard.

[7] This is her total outstanding balance for all convictions; the State cannot say how much she actually must pay to vote.

[8] People are not relieved from their obligation to pay their LFOs in the absence of a monetary electoral standard. The State retains powerful means of extracting payment from those actually able to pay. A1076.

The State seeks to limit *Harper* to "explicit poll taxes." Br. at 22. *Harper* is not amenable to such a cramped reading. The Court has applied *Harper* expansively, including to candidate filing fees, carefully guarding against a democracy manipulated by wealth tests. *See Bullock v. Carter*, 405 U.S. 134, 144 (1972) (striking down candidate filing fees because they are "related to the resources of the voters supporting a particular candidate."); *Lubin v. Panish*, 415 U.S. 709, 719 (1974). If *Harper* reaches such indirect impacts of wealth on voting power, it certainly reaches the direct wealth restriction on voting at issue here.[9] *Harper* ultimately stands for a principle that should be uncontroversial: The Constitution "bars a system which excludes those unable to pay a fee to vote." 383 U.S. at 668. Florida's pay-to-vote system defies this simple command.

2. The State May Not Punish a Person for His Poverty.

The Supreme Court has consistently applied *Griffin* to ensure criminal defendants are not treated more harshly because of their poverty. *See Douglas v.*

[9] The State argues that "[i]f requiring some people to pay to *prove* their qualifications to vote does not run afoul of *Harper*, then surely requiring [payment for people with felony convictions] to *become qualified* should not either[.]" Br. at 24. This is backwards. *Harper* itself struck down a requirement to pay a fee *to become qualified* to vote. 383 U.S. at 666. Moreover, the Court has never held that the State may require people to pay to prove their qualifications if they cannot afford to do so. Quite the opposite. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 201 (2008) ("The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper,* if the State required voters to pay a tax or a fee to obtain a new photo identification.").

California, 372 U.S. 353 (1963) (guaranteeing access to counsel in a first appeal); *Roberts v. LaVallee*, 389 U.S. 40 (1967) (requiring provision of a free transcript of a preliminary hearing); *Mayer v. Chicago*, 404 U.S. 189 (1971) (requiring provision of an adequate record in an appeal not involving incarceration). The Court has also applied *Griffin* to prohibit punishing defendants more harshly because they are unable to pay LFOs. In *Williams*, the Court held that a person cannot be confined beyond the statutory maximum sentence merely because of inability to pay a fine. 399 U.S. at 241. In *Tate*, the Court held that a fine cannot be converted to a prison sentence because someone is unable to pay. 401 U.S. 395. And in *Bearden*, the Court held that the State cannot revoke probation and re-imprison a person because they are unable to pay LFOs. 461 U.S. 660.

Two critical takeaways emerge. First, the criminal justice system may not "visit[] different consequences on two categories of persons," *Williams*, 399 U.S. at 242, merely because one group is unable to pay LFOs. In practice, that means *both* that the State cannot price indigent defendants out of judicial process and the State cannot "punish[] a person for his poverty." *Bearden*, 461 U.S. at 671. Second, like *Harper,* the analysis in the *Griffin-Bearden* line of cases takes into account the *general* importance of the right at stake but does not rely on the defendants' *entitlement* to the right. Indeed, the Court made clear in each of these cases that the criminal defendants did not have any independent right to an appeal, to be free from

imprisonment, or to their probationary status. *Griffin*, 351 U.S. at 18 ("[A] State is not required by the Federal Constitution to provide . . . a right to appellate review at all."); *Bearden*, 461 U.S. at 670 (quoting *Williams*, 399 U.S. at 243)).

Thus, "the *Griffin-Bearden* principle straightforwardly applies here." *Jones*, 950 F.3d at 819. The State concedes that its interest in felony disenfranchisement is punitive. Br. at 43; *see also Jones*, 950 F.3d. at 819. And like a term of imprisonment, parole, or probation, felony disenfranchisement is "a *continuing* form of punishment." *Id.* And under SB7066, whether the punishment of disenfranchisement continues turns *solely* on the basis of wealth: "The felon with money in the bank [or family or friend with money in the bank] will be re-enfranchised. But the felon who can't will continue to be barred." *Id.*

Just as it did not matter in *Bearden* that probation is a matter of grace, it does not matter here that rights restoration is: "Merely because the State could strip the rights of both felons does not mean it can continue punishment for some and not others." *Id.*; *see United States v. Plate*, 839 F.3d 950, 956 (11th Cir. 2016) ("Plate was treated more harshly in her sentence than she would have been if she (or her family and friends) had access to more money, and that is unconstitutional."). Because "differential punishment on account of wealth strikes at the heart of *Griffin*'s equality principle," *Jones*, 950 F.3d at 820, SB7066 cannot stand absent an ability-to-pay exception.

The State attempts to disaggregate *Griffin, Harper,* and *Bearden,* confining each to its facts. The State's assertion that the *Griffin-Harper-Bearden* line of cases are disconnected precedents—and that *Griffin* solely applies to judicial processes, Br. at 24-26—would come as a surprise to the Court, which has consistently applied *Griffin* elsewhere. *See Harper*, 383 U.S. at 668 (citing *Griffin*); *Williams*, 399 U.S. at 241 (same); *Bearden,* 461 U.S. at 665 ("Due process and equal protection principles converge in the Court's analysis in *these cases*." (citing *Griffin*) (emphasis added)); *M.L.B.,* 519 U.S. at 124 ("But our cases solidly establish two exceptions," voting and criminal justice).

None of the cases relied on by the State for its contention that the Court has "circumscribed *Griffin* to cases involving access to judicial process," stands for that proposition. In *Christopher v. Harbury*, 536 U.S. 403 (2002), and *Lewis v. Casey*, 518 US. 343 (1996), the Court simply described a line of cases as involving access to the courts but said nothing about circumscribing *Griffin*. Further, *Kadrmas v. Dickinson Public Schools* cuts against the State. 487 U.S. 450, 460 (1988). *Kadrmas* considered whether the state was required to provide free transportation to public schools. Resolving that question, Justice O'Connor distinguished *Griffin* because the State "does not maintain a legal or a practical monopoly on the means of transporting children to school." 487 U.S. at 460-61. The State *does* maintain both a legal and practical monopoly on access to the franchise.

Likewise, the State relies on *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), a case about access to bail hearings, to cabin *Griffin.* Br. at 26. But *Walker* says the opposite of what the State contends. In *Walker*, it was the *dissent* that argued that *Griffin* should be confined to access to judicial process; *Walker*'s majority opinion held that such a limitation was "unprincipled" and "ad hoc." 901 F.3d at 1264. *Walker* thus held that the correct analysis would follow *Bearden* and *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc) (applying *Griffin-Bearden* to money bail), which the district court and *Jones* panel did.[10]

The State next argues that the *Williams-Tate-Bearden* line of cases is limited to imprisonment. Br. at 27; *but see M.L.B.*, 519 U.S. at 111 ("*Griffin*'s principle has not been confined to cases in which imprisonment is at stake."). Even assessing *Bearden* in isolation, this argument fails. *Bearden* sets out a balancing test—the first factor of which is "the nature of the individual interest affected." 461 U.S. at 666-67. This would be nonsensical if *Bearden* only applied to incarceration.

The State's next novel theory—that *Bearden* applies only to "vested" rights—also fails. Br. at 28. It makes no sense in the context of *Griffin*; nor does it make sense as applied to *Bearden*'s most direct predecessors—*Tate* and *Williams*—where the Court limited the extension of punishment due to inability to pay without the

[10] *Pugh* is "binding as precedent in the Eleventh Circuit." *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

presence of any similar "vested—albeit conditional—liberty" interest. *Id.*; *see Williams*, 399 U.S. at 243; *Jones*, 950 F.3d at 822. It also makes no sense in the context of bail setting. *Pugh*, 572 F.2d 1053 (applying *Griffin-Bearden* to money bail). Finally, if *Bearden*'s logic were tied to probation as a vested right, it is odd that *Bearden* never speaks in those terms.

Next, the State argues that *Williams-Tate-Bearden* should not apply because SB7066 relieves rather than imposes disenfranchisement. Br. at 30. But neither does probation impose punishment; it grants reprieve from punishment. The State's "relabeling" of a scheme that punishes Plaintiffs for their poverty is "a sure sign that its . . . distinction is made-to-order." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 399 (2010).

Finally, the State argues that "reform may take one step at a time." Br. at 32 (citing *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966)). True enough. But each step must comply with the Constitution.[11] *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."). SB7066 does not.

[11] Moreover, *Katzenbach* "expressly declined to rule on whether the distinction drawn by Congress, pursuant to its enforcement power, would violate the Equal Protection Clause if enacted as a stand-alone measure by a state." *Jones*, 950 F.3d at 824.

B. The *Bearden* Factors Confirm That Florida's Pay-to-Vote System Is Unconstitutional.

In *Bearden*, the Court synthesized its wealth-discrimination cases as requiring a "careful inquiry" into four factors: (1) "the nature of the individual interest affected," (2) "the extent to which it is affected," (3) "the rationality of the connection between legislative means and purpose," and (4) "the existence of alternative means for effectuating the purpose." 461 U.S. at 666–67 (quotations omitted). These factors confirm that Florida's pay-to-vote scheme is unconstitutional.

First, the nature of the interest is paramount; the right to vote is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *cf. United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019) (Gorsuch, J., plurality) (describing the right to vote, along with the right to trial by jury as "the heart and lungs, the mainspring and the center wheel' of our liberties" (internal quotations omitted)). The State nonetheless says the interest is not weighty because people with convictions have lawfully lost their right to vote. Br. at 59. But the individuals in *Bearden* had also lawfully lost their right to liberty. "[T]he state's ability to deprive someone of a profoundly important interest does not change the nature of the right[.]" *Jones*, 950 F.3d at 823.

Second, "the interest is profoundly affected." *Id.* at 826. The LFO requirement "depriv[es] [Plaintiffs] of a meaningful opportunity to enjoy th[e] benefit" of rights

restoration. *Id.* (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973)). Again, the State's assertion that SB7066 "do[es] not adversely affect felons at all because those laws do not disenfranchise anyone" is meaningless. Br. at 41. To be sure, Plaintiffs initially lost the right to vote because of their conviction, just as the *Bearden* parties lost their liberty because of their convictions. *See Williams*, 399 U.S. at 242. But they *remain* disenfranchised *solely* because they are unable to pay their LFOs.

The State's fleeting reference to the existence of "alternatives" to payment—termination via payee consent,[12] community service, and clemency—is equally unpersuasive. Br. at 41. Each alternative is practically illusory, discretionary, and does not require consideration of ability to pay. Indeed, the legislature went out of its way to *exclude* the means by which Florida's criminal courts actually address inability to pay: conversion to civil liens. A1116-17. The State concedes that the current clemency process does not provide a "remedy in fact," nor does it contest that the community service option is "often wholly illusory." A459, A462. The State offered *no* evidence that these purported alternatives provide actual relief.

The third and fourth factors similarly weigh definitively in Plaintiffs' favor. The third factor asks a court to analyze the fit between the legislative means and

[12] Allowing collections agencies to decide when a person is eligible to vote is one of the many irrational consequences of SB7066. *See* Fla. Stat. § 98.0751(2)(a)(5)(e)(II); Doc-167-35 at 3, 167-36 at 2.

purpose. The State has abandoned both its collections and its purity-of-the-ballot-box rationales for SB7066's LFO requirements. Br. at 42. That is for good reason because, as applied to those unable to pay, those rationales are plainly irrational: "The State cannot draw blood from a stone." *Jones*, 950 F.3d at 827; *see also Tate*, 401 U.S. at 399; *Zablocki v. Redhail*, 434 U.S. 374, 389 (1978). And *Harper* has held that wealth is never germane to voting qualifications. 383 U.S. at 668.

Instead, the State argues that SB7066's LFO requirements are a "perfect fit" for its goal of "ensuring that only felons who have completed all terms of their sentences are automatically welcomed back to the electorate." Br. at 42. This is circular; it merely states what SB7066 accomplishes, not what purpose it furthers. The only *purposes* the State identifies are its "retributive and restorative interests." Br. at 43. But that is the trouble—the State cannot punish Plaintiffs for their poverty. The State can punish people with convictions by disenfranchising them. It can insist on payment of LFOs as punishment as a citizen becomes able to pay. But it cannot punish citizens in proportion to their wealth rather than their culpability. *Jones*, 950 F.3d at 827. That is precisely what SB7066 accomplishes: "equally guilty but wealthier felons are offered access to the ballot while these plaintiffs continue to be disenfranchised, perhaps forever." *Id.*

Finally, the fourth factor asks if there are alternative means available. The State does not contest that it "already has numerous other means for exacting

compliance with [financial] obligations, means that are at least as effective as the instant statute's and yet do not impinge upon" the right to vote. *Id.* (citing *Zablocki*, 434 U.S. at 389). The State's only response is that it is vindicating a "deeper" purpose of punishment. Br. at 43. This interest is not undermined by the district court's ruling. People with felony convictions continue to owe those LFOs and must pay them according to their ability. Withholding the right to vote from those unable is "no more than a naked assertion" that those unable to pay are deserving of greater punishment. *Bearden*, 461 U.S. at 671.

C. The State's Focus on a Purpose Inquiry and an Indigence Standard Is Misplaced.

The State asks this Court to jettison the Supreme Court's wealth discrimination doctrine and apply a purposeful discrimination standard that the Court has specifically rejected. The State also proposes a constitutional distinction between indigence and ability to pay that is absent from precedent. Intent is not an element in wealth discrimination cases.[13] *Jones*, 950 F.3d at 828 (citing *M.L.B.*, 519

[13] This does not, as the State suggests, make the Equal Protection Clause *more* protective against wealth discrimination than racial discrimination. Br. at 16. Racial classifications are always subject to strict scrutiny, whereas lines drawn based on wealth are subject to heightened scrutiny only in the contexts that intersect here—criminal justice and access to the ballot. Thus, the Court's wealth discrimination doctrine simply does not fit into a neat "pigeonhole analysis," *Bearden,* 461 U.S. at 666.

U.S. at 126-27). Indeed, "the Supreme Court has *never* required proof of discriminatory intent in a wealth discrimination case." *Id.*[14]

The State argues that *Jones* "misreads *M.L.B.*" because *M.L.B.* must be read to only address laws that "apply to *all* indigents and *do not reach anyone outside that class.*" Br. at 16 (emphasis in original). The State argues that a definition of indigence based on inability to pay is inconsistent with *M.L.B. Id.* But it is the State's proposed limitation that is inconsistent with *M.L.B.*, and *Bearden*.

Bearden clarified that "indigency in this context *is a relative term rather than a classification*." 461 U.S. at 667 n.8 (emphasis added); *see id.* ("[A] defendant's level of financial resources is a point on a spectrum rather than a classification."). Thus, you can no more throw a person with a middle-class income in a debtors' prison for their inability to pay millions in restitution than you could an indigent person. Likewise, *M.L.B.* itself contradicts the State's position:

> Sanctions of the *Williams* genre, like the Mississippi prescription here at issue, are not merely *disproportionate* . . . . **[T]hey are wholly contingent on one's ability to pay,** and thus 'visi[t] different consequences on two categories of persons,'; they apply to all indigents and do not reach anyone outside that class.

[14] *Joel v. City of Orlando* is inapposite. 232 F.3d 1353 (11th Cir. 2000). *Joel* involved a challenge to a municipal ordinance banning camping on public property, brought by a homeless Plaintiff. That case did not involve a government requiring payment of anything to obtain a benefit, it did not involve a fundamental right, and this Court did not even *mention* indigence in its opinion.

519 U.S. at 127 (emphasis added). Thus, in the *same* sentence the State relies upon to argue that indigence and ability to pay are distinct in this context, the Supreme Court uses them interchangeably.[15] The Supreme Court cannot have more plainly explained that the impermissible distinction in wealth discrimination cases is between those able to pay and those unable to pay.

Regardless, the district court *found* that "[t]he Legislature would not have adopted SB7066 but for the actual motive to favor individuals with money over those

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[15] M.L.B challenged the dismissal of her appeal because although she was *able* to pay the "$100 filing fee," she "lacked funds to pay" "record preparation fees estimated at $2,352.36." 519 U.S. at 109, 106. The Court did not find that M.L.B. lacked means of subsistence or had an income below the poverty line. Instead, the Court granted relief to M.L.B. because she lacked the ability to pay $2,352.36, an amount that even today many Americans living *above* the poverty line cannot pay. *See* Br. at 40 n. 1. Indeed, *most* statutes requiring payment for appellate transcripts involve substantial costs and thus reach beyond the circumscribed class the State proposes. At a conservative estimate of 500 pages, the cost per transcript in Georgia would be $2,500, in Tennessee, $2,000, in New Jersey, $2,340, and so on. *See* Georgia Admin. Office of Courts, Policies and Fees for Court Reporting Services, https://ocp.georgiacourts.gov/board-of-court-reporting/policies-and-fees-for-court-reporting-services/; Tenn. Code § 40-14-312; N.J. Courts, Estimated Costs for Transcripts, https://njcourts.gov/forms/12188_est_cost_transcript.pdf. And yet, it is uncontroversial that *Griffin* requires an ability-to-pay mechanism for criminal appeal transcripts.

States have never understood this line of cases to be limited to those living under a certain income threshold. *See, e.g., Cleveland v. City of Montgomery*, 2014 WL 6461900, at *3 (M.D. Ala. Nov. 17, 2014) (establishing a presumption of inability to pay for those below 125% of the federal poverty level, otherwise providing the debtor "an opportunity to show the court that she is unable to pay, taking into consideration disposable income, liquid assets, and earning potential"); Wis. Stat. § 814.29(1)(d) (directing court to consider "household size, income, expenses, assets and debts" in determining ability to pay).

without." A1179. In particular, the court concluded that the legislature's inclusion of civil liens in its pay-to-vote system was discriminatory. *Id*. The court reiterated this finding in its order denying a stay. Doc-431 at 8 ("Why else did SB7066 prove that amounts converted to civil liens were still disqualifying? . . . A motive was to prefer those with money over those without.").[16]

D. Florida's Pay-to-Vote System Fails Rational Basis Scrutiny.

The district court's ruling that Florida's pay-to-vote system fails rational basis rests on three factual findings that the State does not contest: (1) "the mine-run of felons affected by the pay-to-vote requirement are genuinely unable to pay"; (2) the State has adopted a means of enforcing SB7066—"the every-dollar method"—that undermines its own rationales; and (3) the "State has shown a staggering inability to administer the pay-to-vote system." A1075-77, 1095. Each on its own renders SB7066's LFO requirements irrational.

First, the district court found "that the overwhelming majority of felons who have not paid their LFOs in full, but who are otherwise eligible to vote, are genuinely unable to pay the required amount." A1075-76. Because SB7066 is irrational as to "the mine-run of felons affected by this legislation," its wealth classification is irrational as a whole. *Jones*, 950 F.3d at 814; *Califano v. Jobst*, 434 U.S. 47, 55

[16] The State objects that the district court was without jurisdiction to say as much in its order denying the stay. Br. at 18. The court was merely reciting facts it had already found.

(1977) ("[A] legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples."). The State previously conceded this point. No. 19-14551, Br. at 43 (arguing that SB7066 passes rational basis "[a]bsent any evidence that felons unable to pay their outstanding legal financial obligations vastly outnumber those able to pay"). Further, the evidence shows that the legislature was aware that most criminal defendants are indigent and unable to pay their LFOs when it enacted SB7066. *Jones,* 950 F.3d at 816 ("[T]he legislature has specifically stated that '[m]ost criminal defendants are indigent.').

Second, the State has abandoned its only rationale—demanding "pay[ment of the] debt to society in full," Br. at 1—by adopting the "every-dollar method" of counting LFO payments. A1092. The district court offered specific examples, A1092-1095, which illustrate the problem. One startling example: three individuals are convicted of the same crime, and each is assessed the same fee. The first person has money, pays the fee, and can vote. The second person has no money but a relative pays for her appellate-related fees. She loses the appeal, but her appellate-related payment exceeds the unpaid fee she was assessed, so she can vote. The third person also has no money, takes no appeal, and like the second, still owes her fee. She cannot vote. "This result is bizarre, not rational." A1095.

Additional examples abound. Most Florida counties contract with private collection agencies to collect these debts, and most retain a 40 percent collection fee. A1111; Doc-360-47 at 56-57. At trial, the FLDOE Director testified that, under the every-dollar method, someone might pay their entire dollar amount of restitution in collection agency fees, and thereby get to vote, despite paying nothing to the victim. Tr. 1290. Even if the debt-to-society interest proffered by the State were legitimate, the pay-to-vote system does not advance that interest, and thus "lacks a rational relationship" to it.[17] *Romer v. Evans*, 517 U.S. 620, 632 (1996). Like in *Romer*, Florida's pay-to-vote system "is at once too narrow and too broad." *Id.* at 633. It is too narrow because it permits people to vote without actually "pay[ing] their debt to society in full." Br. at 1. It is too broad because, given the manner and sequence in which the State assesses surcharges and contracts private collection of non-restitution debts, people are required to pay for things—like private collection agency fees—that have nothing to do with their "debt to society." "The search for the link between the classification and objective [in rational basis review] gives substance to the Equal Protection Clause." *Romer*, 517 U.S. at 632. There is no link here.

[17] Indeed, the State's system *incentivizes* a citizen to pay late fees and other non-disqualifying LFOs rather than restitution because the former will be tracked by the State and latter is not.

To this the State responds that it serves the State's interest in demanding a citizen "pay his debt to society in full" to require he "pay only the monetary *amounts* set forth in their sentencing documents" even if he does not actually discharge the debts imposed. Br. at 38.[18] This conception of paying one's debt to "society" cannot conceivably be a legitimate interest upon which to dole out the right to vote. Gone is the punitive or compensatory purpose of repaying the debt, replaced by a naked requirement to divest oneself of a set sum of money in order to vote.

II. The District Court Correctly Found That Costs and Fees Are Taxes Prohibited by the Twenty-Fourth Amendment.

A. The Twenty-Fourth Amendment Applies to Rights Restoration.

The Twenty-Fourth Amendment prohibits conditioning voting on the payment of costs and fees. The Twenty-Fourth Amendment provides that the right to vote "shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV. As the district court explained, "[a]ny other tax means any other tax. A law prohibiting citizens from voting while in arrears on their federal income taxes or state property taxes would plainly violate the Twenty-Fourth Amendment. . . . The very idea is repugnant." *Id*.

[18] The State also argues that "[t]he determinations of Florida's executive branch" cannot form a basis for attacking SB7066. Br. at 37. But the State cites *no* authority for the proposition that it can enforce a law that, in practice, lacks any rational connection to the State's alleged purposes.

The State contends that "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." Br. at 44. The district court's dismissal of this argument below as "mak[ing] no sense," A1105, was not "cavalier." Br. at 45.[19] It follows the Twenty-Fourth Amendment's text: "A law allowing felons to vote in federal elections but only upon payment of a $10 poll tax would obviously violate the Twenty-Fourth Amendment." A1105.

Richardson does not exempt felony disenfranchisement schemes from scrutiny under other constitutional provisions. *Hunter*, 471 U.S. at 233. ("§ 2 was not designed to permit the purposeful racial discrimination . . . which otherwise violates § 1 of the Fourteenth Amendment."); *Jones*, 950 F.3d at 822 ("[T]he abridgement of a felon's right to vote is still subject to constitutional limitations[.]"). If the disenfranchisement provision cannot permit what the Fourteenth Amendment otherwise prohibits, then neither can it permit what *subsequently* enacted constitutional amendments prohibit. Just as "the Tenth Amendment cannot save

[19] The out-of-circuit cases relied on by the State are not in conflict with the district court's opinion, which ruled that statutory fines and restitution fall outside the Twenty-Fourth Amendment's scope. Br. at 45 (citing *Bredesen,* 624 F.3d 742 (holding restitution and child support do not constitute a poll tax); *Harvey*, 605 F.3d 1067 (holding fines and restitution are not poll taxes)). Neither of those cases considered fees and costs like those at issue here nor considered the phrase "other tax." *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984 (4th Cir. Feb. 23, 2000), was a *pro se* unpublished case with scant reasoning.

legislation prohibited by the subsequently enacted Fourteenth Amendment," *id.*, Section 2 of the Fourteenth Amendment cannot save legislation that denies or abridges the right to vote by reason of failure to pay a tax in violation of the Twenty-Fourth Amendment. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

Under the State's position, *none* of the Constitution's voting rights amendments apply to rights restoration schemes. The Fifteenth Amendment would not apply to a law restoring voting rights to white people but not Black people, the Nineteenth Amendment would not limit the State's ability to restore voting rights to men but not women, and the Twenty-Sixth amendment would not prevent a law restoring voting rights only to people over the age of 21. To state these propositions is sufficient to refute them. The voting amendments are *negative* protections; they place absolute prohibitions on the State's power to set voting qualifications. There are no exemptions.

B. Court Costs and Fees Are "Other Tax[es]."

Court fees and costs constitute taxes for the purpose of the Twenty-Fourth Amendment. The Twenty-Fourth Amendment sought to prohibit the practice of "exact[ing] a price for the privilege of exercising the franchise," which grew out of a "general repugnance to the disenfranchisement of the poor." *Harman v. Forssenius*, 380 U.S. 528, 539 (1965). Its expansive language is intended to "nullif[y] sophisticated as well as simple minded modes" of taxing prospective

voters and extends to "equivalent or milder substitute[s]" for an explicit poll tax. *Id.* at 540-42. This prohibition applies to Florida's system of assessing fees and costs on criminal defendants and denying them the vote until the exaction is paid. A1112.

The State asserts that fees and costs are imposed "as punishment for the conviction of a crime," and thus, they are not taxes. Br. at 46. This position, relying on labels and semantics, ignores both the Supreme Court's functional approach for identifying a tax and the record. That the fees and costs at issue here are (sometimes) associated with criminal sentences and *may* have *some* punitive purpose does not preclude them from having a predominantly revenue-generating purpose.[20] Nor is the distinction particularly salient where the fees can be *both* punishment *and* taxes because both are within the State's authority to impose. *See Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922) (acknowledging that whether the purpose of an exaction is punitive or remunerative "may be immaterial" to its status as a tax "[w]here the sovereign enacting the law has power to impose both tax and penalty").

Determining "whether an exaction is a 'tax' for constitutional purposes [requires] a 'functional approach,' not simply [] consulting the label given the exaction by the legislature that imposed it." A1106 (citing *NFIB*, 567 U.S. at 564-

[20] That these fees are only placed on those accused of violating a law or may have regulatory goals are not dispositive factors. In *National Federation of Independent Businesses v. Sebelius*, the tax was only imposed on those that failed to comply with the insurance mandate. 567 U.S. 519, 567 (2012) ("*NFIB*") ("[T]axes that seek to influence conduct are nothing new.").

66). Just as "[m]agic words or labels should not 'disable an otherwise constitutional levy," *NFIB*, 567 U.S. at 564-65 (internal quotations omitted), neither should magic words or labels *enable* an otherwise *un*constitutional levy.

The "standard definition of a tax" is an "enforced contribution to provide for the support of the government." *United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 606 (1975) (internal quotations omitted). The "essential feature of any tax" is that "[i]t produces at least some revenue for the Government." *NFIB*, 567 U.S. at 564 (internal citation omitted). It is undisputed that Florida has chosen to pay for its court system through LFOs, particularly costs and fees. A1109; Fla. Const. art. V, § 14; Tr. 295-96. And the pressure to fund the court system and other functions through costs and fees has led to their proliferation. *See* Tr. 287-88, 295-96, 356; *Timbs v. Indiana*, 139 S. Ct. 682 (2019) ("Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue."). If the state funded its courts by assessing a flat fee on residents, it would be a tax. The fact that the State instead funds its courts and other functions by assessing myriad fees and costs only against criminal defendants does not change the fundamental character of the exactment. Since the costs and fees were "laid to raise revenue," their identity as taxes "is beyond question." *United States v. Constantine*, 296 U.S. 287, 293 (1935).

Additional considerations in determining whether an exaction is a tax include: (1) amount: a "prohibitory" charge is likely a penalty, while a modest charge is likely a tax; (2) scienter: punishment is imposed on those who intentionally break the law; and (3) enforcement: whether a taxing authority or agency with responsibility to punish is charged with enforcement. *NFIB*, 567 U.S. at 565-66. All these factors weigh in favor of finding that fees and costs are taxes. Fees and costs in Florida "are assessed regardless of whether a defendant is adjudged guilty, bear no relation to culpability, and are assessed for the sole or at least primary purpose of raising revenue to pay for government operations—for things the state must provide, such as a criminal justice system, or things the state chooses to provide, such as a victim compensation fund." A1111-12 The amount of a given fee is fixed by the legislature. A1111. For most categories of fees and costs, the amount is modest. *Id*.[21] And fees and costs are imposed on every criminal defendant, regardless of the State's punitive interests, *i.e.* whether that defendant is convicted, enters a no-contest plea, or has adjudication withheld. A1110-11; *see* Fla. Stat. § 948.01 (adjudication withheld is appropriate where the court deems it unnecessary to impose the penalty). Some of these fees and costs are imposed as surcharges or administrative fees—sometimes as a flat amount, other times a percentage—on top of fines or restitution. A1088.

[21] Since multiple costs and fees are levied in each case, the cumulative amount can be considerable. In one county, the minimum amount of mandatory costs and fees is between $558. *Id*.

These plainly serve no punitive purpose. Further, costs and fees are "are ordinarily collected not through the criminal justice system but in the same way as civil debts or other taxes owed to the government, including by reference to a collection agency." A1110-11. The district court's factual findings—which are not clearly erroneous—compel the conclusion that fees and costs are "other tax[es]" under the Twenty-Fourth Amendment.[22]

III. Florida's Pay-to-Vote System Violates Due Process and Is Unconstitutionally Vague.[23]

A. Florida's Pay-to-Vote System Violates Due Process.

The fundamental requirement of due process is that individuals be afforded the opportunity to be heard at a meaningful time and in a meaningful manner prior to being deprived of a governmental benefit. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Under *Mathews*, the determination of what process is due rests on the balance between (1) the interest affected; (2) the risk of erroneous deprivation under

[22] The State asserts that fees and costs are "materially indistinguishable" from mandatory minimum fines because the sentencing judge is required to impose fees and costs on all defendants. But mandatory fines do not apply equally to *all* criminal defendants. They vary based on the severity of the offense and are ordinarily only imposed upon defendants adjudged guilty. A1109.

[23] The district court squarely ruled on the due process and vagueness claims: "[T]he requirement to pay, as a condition of voting, amounts that are unknown and cannot be determined with diligence is unconstitutional." A1151. The State has conceded this holding is "unrelated to its wealth-discrimination analysis." State's June 19, 2020 Brief at 46. The court made this ruling clear in both its opinion, A1151, and its order denying the stay, Doc-431 at 5, 9, 11.

the current procedures and the "probable value, if any, of additional or substitute procedural safeguards;" and (3) the state's interest, including the "fiscal and administrative burdens" additional procedures would entail. *Id.* at 335. The *Mathews* test compels a ruling in favor of Plaintiffs' due process claim.

1. Voting is an Exceedingly Important Interest.

Floridians have a substantial interest in knowing whether, or how much, they must pay to vote. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[V]oting is of the most fundamental significance under our constitutional structure." (internal quotations omitted)).

The State contends that "the deprivation of Plaintiffs' right to vote took place when they were convicted of their felonies" and Florida's pay-to-vote system "do[es] not add to that deprivation." Br. at 59. This is sophistry. Many Floridians have *already* had their rights automatically restored by Amendment 4. They are eligible voters who stand in the shoes of any other eligible voter but are unable to vote because of the State's inability to determine their eligibility. For others, the State is unable to tell them what they must pay to vote. For the first category, the State is wrong—those Floridians *do* have the right to vote, and that right is deprived by the State's incompetent administration of its pay-to-vote system. For the second category, the State withholds the information needed to obtain the right to vote. For both, the relevant interest is voting, which is protected by the Due Process Clause.

See Atherton v. D.C. Office of the Mayor, 567 F.3d 672, 689 (D.C. Cir. 2009); *see also Ky. Dept. of Corrs. v. Thompson*, 490 U.S. 454, 462 (1989). The first *Mathews* factor weighs heavily in Plaintiffs' favor.

2. The District Court's Injunction Remedies the High Risk of Erroneous Deprivation.

The State has shown a "staggering inability to administer the pay-to-vote system," A1077, resulting in a high risk of erroneous deprivation of the right to vote. Absent the district court's injunction, the State has proven itself incapable of administering its pay-to-vote system in a manner that provides citizens or elections officials with the information necessary to determine eligibility or what citizens must pay to become eligible. The State's inability to administer its pay-to-vote system takes three forms—(1) determining the original obligation, (2) determining the amount that has been paid, and (3) processing registrations at FLDOE.

First, the State's inability to determine the amount of disqualifying LFOs imposed creates a risk of erroneous deprivation. "Many felons do not know, and some have no way to find out, the amount of LFOs included in a judgment." A1077. The district court credited the testimony of Dr. Traci Burch and her team of "well-trained, highly educated . . . doctoral candidates" who "made diligent efforts over a long period to obtain information on 153 randomly selected felons." A1078. The records for only 3 of the 153 were without inconsistencies. *Id*. Few citizens have a copy of their judgment "after any term of custody or when years or decades have

passed" and "[m]any counties charge a fee for a copy of a judgment." *Id.* Judgments may not be available at all for older felonies, or "only from barely legible microfilm or microfiche" after "substantial delay." A1079.

Even if the judgment is available, "when a judgment does not allocate financial obligations to specific offenses, it is impossible to know what amount must be paid to make the person eligible to vote." A1080. Indeed, this was the case for one plaintiff, whose "judgment . . . includes a $1,000 fine, but the judgment does not indicate whether the fine applies to the felony or the misdemeanor or partly to one and partly to the other." *Id.* The FLDOE Director reviewed his judgment at trial, and "said she did not know whether" he must pay the $1,000 in order to vote. *Id.* Thus, under this system, a voter can be eligible—having paid all LFOs intended to be allocated to the felony conviction—but unable to affirm her eligibility due to the State's failed administration of its pay-to-vote system. She would be erroneously deprived of the right to vote. The State made this clear: asked at trial "[w]hat if the voter doesn't know [if she is eligible] and so can't swear," the FLDOE Director testified, "[i]f I were in the voter's position, I don't know that I would be swearing under oath if I wasn't sure about that . . . ." A993.

A judgment with both a felony and misdemeanor conviction is not unusual. Sentencing judges had no reason to specify the convictions to which fines attached because until now, it did not matter. Nor is this an isolated example of the State's

inability to determine whether particular LFOs are disqualifying. Indeed, when asked whether "the Secretary of State ha[d] a position as to which specific LFOs are disqualifying for voters in Florida," the Secretary's designated corporate representative responded "[n]ot at this time." Doc-389-9 at 19. "In sum, 18 months after adopting the pay-to-vote system, the State still does not know which obligations it applies to. And if the State does not know, a voter does not know." A1080. The State's inability to determine whether, and how much, a person must pay to vote creates a severe risk of erroneous deprivation.

Second, the State's system creates additional risk of erroneous deprivation because, "[d]etermining the amount that has been paid on an LFO presents an even greater difficulty. It is often impossible." *Id*. The State's payment records are "incomplete and inconsistent, especially for older felonies," A1085, the State does not track restitution payments to victims, A1087, and does not track fees paid to, and retained by, collection agencies. *Id*. The record demonstrates that "even using the every-dollar method, determining the amount of payments allocable to LFOs is sometimes easy, sometimes hard, sometimes impossible." A1096.

Third, the State's inability to make eligibility determinations for those who are already registered to vote guarantees erroneous deprivations. Acknowledging that no one understood Amendment 4 to include an LFO requirement, the legislature included a safe harbor provision in SB7066 that shielded from prosecution those

with disqualifying LFOs who registered to vote after Amendment 4 was adopted but before SB7066 became law. Fla. Stat. § 104.011(3). The FLDOE Director testified that, as of the trial date, there were 85,000 files that needed manual review to determine eligibility due to disqualifying LFOs. A1097-98. At the earliest, given the current pace and resources, the district court concluded it would take 1,491 days—until 2026 or perhaps "into the 2030s"—for eligibility determinations to be made. A1099. Those 85,000 likely include people who have an outstanding balance but are eligible under the "every-dollar" policy, whose civil liens have expired and thus are eligible under the policy "announced" at trial, A1098, whose fines are not attributable to their felony convictions, or whose LFOs are otherwise not disqualifying. But "[t]he uncertainty will cause some citizens who are eligible to vote, even on the State's own view of the law, not to vote, lest they risk criminal prosecution." A1173. A six-to-ten-year timeline for providing eligibility determinations is not the process that is due.

The State does not—and could not—contend that the district court's factual findings about the State's "staggering inability to administer its pay-to-vote system," A1077, are clearly erroneous. Instead, the State contends that (1) the due process remedy is contingent upon the wealth discrimination ruling, (2) the State adequately informs voters of what must be paid to vote, (3) it does not matter exactly how much anyone must pay to vote because few can afford it, and (4) some people will have

an easy time determining how much they must pay to vote. These arguments are meritless.

First, the State contends that its inability to determine how much people must pay to vote is only a problem if Plaintiffs prevail on their wealth discrimination claim because if people do not need to know the amount outstanding to assess their ability to pay, then all that matters is "whether *any* amount remains outstanding." Br. at 52. (emphasis in original). But the State frequently cannot even determine *whether* a person must pay *any* money to vote. The State ignores these factual findings. Moreover, the premise of the State's argument is wrong. If the State conditions rights restoration on satisfying disqualifying LFOs, it must identify "the precise amount," Br. at 52, that must be paid to lawfully register and vote. The Constitution does not allow the State to impose eligibility requirements to vote that it cannot itself discern.

Second, the State contends that it informs people of their LFOs upon conviction and that the every-dollar method "automatically credit[s]" any payments towards the initial obligations. Br. at 53. Neither is true. If the State cannot determine from looking at judgments whether LFOs are disqualifying, *see supra*, then neither can the person at the time of conviction. And FLDOE undertakes a "manual review" for each registrant with a felony conviction record, Tr. at 1182, attempting to locate the sentencing and financial records to determine each person's original LFO obligations associated with disqualifying convictions and any payments made. Doc-

343-1 at 2. It will take years just to complete the review of voters who are currently registered. A1034. There is nowhere a potential registrant can go to learn what the results would be of the State's laborious process. However one describes the State's process, "automatic[ ]" it is not.

Third, the State contends that determining how much Floridians must pay to vote is pointless because most people are too poor to pay and thus "face no ambiguity about whether they can register," Br. at 53-54 (emphasis in original). The State's position is stunning: there is no need to communicate voter eligibility requirements to poor people because they probably cannot afford to pay to vote anyway.[24] Not only is this argument callous, it's wrong. Many people owe (and cannot afford to pay) LFOs that are not actually disqualifying. A1077. Their risk of erroneous deprivation is high. That is particularly so given the threat of criminal prosecution, and the FLDOE Director's testimony that those unsure of their eligibility should not affirm their eligibility by registering to vote. A993. The Due Process Clause does not permit the State to hide how much money stands between its citizens and the ballot box, regardless of how unlikely the State views its collection potential.

[24] The State simultaneously assures this Court that the legislature thought "many felons would, over time, be able to complete the financial terms of their sentences." Br. at 39. This is irreconcilable with the State's view that these same people are too poor to need to know how much they owe.

Fourth, the State contends that some people do not experience difficulty in learning their outstanding LFO balance. Br. at 54-55. But the outstanding balance is no longer even a relevant figure for determining eligibility given the new "every-dollar" method. And the State has done nothing to inform voters or county election officials that they should use the "every-dollar" method to determine eligibility, or how to apply it. A1129; Tr. 502. The State has not made a single eligibility determination under this method. A1098. So even people whose records are obtainable must undertake a math exercise, with variables they cannot solve for, using a formula the State has not communicated, to determine their eligibility. The fact that the task will be easier for some is not license to deny due process to those for whom it will be "hard" or "impossible." A1129.

3. The State Has No Interest in Withholding Eligibility Information, and the Administrative Burden of the District Court's Remedy is Low.

The third *Mathews* factor weighs in Plaintiffs' favor because the State has no interest in withholding eligibility information and the fiscal and administrative burden of the injunction is low. The district court ordered the State to make available its preexisting advisory opinion process—a procedure the State itself recommended at trial, A993—to those seeking a determination of whether, or how much, they must pay to vote. And it required that this determination be timely by creating a safe harbor for registering and voting for those who do not receive an answer within 21

days. In doing so, the court balanced the need to prevent erroneous deprivations of eligible voters with the State's interest in a reasonable opportunity to exclude ineligible voters.

The State contends the district court "exceeded its judicial authority" by "imposing an intricate advisory-opinion process" and should instead have "left it to the State in the first instance to devise an adequate remedy." Br. at 60-61. But the advisory opinion process was the *State's* suggestion—the court only added a requirement that the State *timely* respond. A993, 1147. The State claims that its existing advisory opinion process suffices, Br. at 55, but the testimony of the FLDOE Director showed otherwise. It can take months for FLDOE to provide an advisory opinion following a request, A1000-01, and that is without considering the likely increase of requests for LFO determinations. Without the time limits imposed by the district court, the advisory opinion would have allowed erroneous deprivations to continue apace.

Moreover, the State cannot now, after 18 months of inaction, object to the district court's chosen remedy. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). Indeed, the State conceded that the court should enter a remedy. Tr. at 1587.

B. Florida's Pay-to-Vote System is Unconstitutionally Vague.

For many of the same reasons, Florida's pay-to-vote system is unconstitutionally vague. The Constitution "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." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-24 (2018) (Gorsuch, J., concurring). The requirement of clear laws that allow ordinary people to understand them is rigorously enforced by courts "[w]hen speech is involved . . . to ensure that ambiguity does not chill protected speech." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012). Moreover, failures of administering officials, rather than mere facial vagueness, often make laws void for vagueness. *See Watkins v. U.S.*, 354 U.S. 178 (1957); *Fox*, 567 U.S. at 254.

If the FLDOE Director is unable to determine which LFOs are disqualifying—and has made that determination for none of the 85,000 registrants including Plaintiffs—then "ordinary people" stand no chance. Outside this litigation, the State has not even told voters its process for calculating how much they must pay to vote. Yet the State requires voters to affirm under threat of prosecution that they are eligible to vote to register. Doc-152-33. When asked what those who do not know if they are eligible should do, the FLDOE Director testified she would advise against

swearing to their eligibility. A993. But the State's procedure for determining eligibility—a hearing conducted by Supervisors of Elections—is only available to those who register to vote. "A person cannot invoke this process at all if the person is unable or unwilling to register because the person is uncertain of eligibility and unwilling to risk prosecution." A1131. So, voters are threatened with criminal prosecution if they register or vote while ineligible, yet not even the State can determine whether they are eligible. Florida's pay-to-vote system—the combination of SB7066's requirements and the laws creating criminal liability for ineligible registration and voting—is unconstitutionally vague. The advisory opinion procedure ordered by the district court "remed[ies] the vagueness attending application of the criminal statutes." A1132.

The State contends that the vagueness doctrine is inapplicable because the relevant criminal statutes are "facially unambiguous." Br. at 56. But as the district court explained, "in the absence of eligibility standards that ordinary people can understand—standards that can be applied to known or knowable facts—the clarity of the statutory words is meaningless." A1130 (internal quotation marks omitted). Moreover, SB7066—which imposes a civil penalty of disenfranchisement—is itself unconstitutionally vague even absent criminal penalties because an ordinary person cannot know which LFOs are disqualifying. *See Dimaya*, 138 S. Ct. at 1229 (Gorsuch, J., concurring).

The State next contends that the scienter requirements for the registration and voting crimes solve the vagueness problem. This is wrong for three reasons. First, the voter registration form's "Criminal Offense" warning omits the scienter requirement, creating a chill that prevents people from registering. Doc-152-33.[25] Second, the State seems to suggest that a person does not knowingly or willfully provide false information if she affirms she is eligible to vote while unsure of her eligibility. Br. at 58. This appears to be a position borne of litigation strategy. At trial, the FLDOE Director testified a person should *not* register under that circumstance, A993, and the State has instructed SOEs otherwise in the past, Doc-152-79. The State's litigation strategy does not bind prosecutors. Finally, in practice, the mere act of affirming eligibility while ineligible is sufficient evidence for the FLDOE to refer a case for investigation and prosecution of willful voter fraud. *See* Doc-348-25; Doc-286-19.

The district court's injunction remedying the due process and vagueness violations should be affirmed.

[25] The State retorts that everyone is presumed to know the law, Br. at 58, but that cannot extend to situations in which the State inaccurately represents the law on its own forms.

IV. The Court Should Reject the State's Transparent Attempt to Overthrow Amendment 4.

The State contends that it is pointless to reenfranchise its citizens if it cannot deny rights restoration to those who are too poor to pay or have not paid a tax. But these unconstitutional applications of Florida law, to the extent they stem from Amendment 4, are easily severed from the Amendment.[26] Under Florida law, unconstitutional provisions will be severed when the following factors are met:

> (1) they can be separated from the remaining valid provisions[;] (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void[;] (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other[;] and (4) an act complete in itself remains after the invalid provisions are stricken.

Wollschlaeger v. Governor, 848 F.3d 1293, 1318 (11th Cir. 2017). "[T]he purpose underlying severability [is] to preserve the constitutionality of enactments where it is possible to do so." *Ray v. Mortham*, 742 So.2d 1276, 1281 (Fla. 1999). With respect to citizen-initiated constitutional amendments, courts "must . . . uphold [an]

[26] SB7066 defines "completion" of sentence as requiring full payment of LFOs. *See* Fla. Stat. § 98.0751. Completion under Amendment 4 is not otherwise defined under Florida law. Order on Mot. to Disqualify at 14-15 (noting that the meaning of "completion of all terms of sentence is not at issue" in this case because it is defined under SB7066). Thus, the district court has enjoined only the statutory definition of "completion" under SB7066, and not any portion of Amendment 4, which itself does not require full payment of LFOs as a condition of rights restoration. *See also, e.g.*, Doc-340 at 248-49 (Pl.'s Trial Br.). Nevertheless, the *Raysor* Appellees address the State's arguments with respect to severability, which are wrong.

amendment if, after striking the invalid provisions, the purpose of the amendment can still be accomplished." *Id.* at 1281. Thus, the "key determination" here is whether Floridians' overall purpose in approving Amendment 4 will be furthered even if its unconstitutional applications are enjoined.[27] *State v. Catalano*, 104 So. 3d 1069, 1080-81 (Fla. 2012). It will.

A. Voters' Purpose in Enacting Amendment 4 Was To End Permanent Disenfranchisement for the Majority of Floridians with Past Felony Convictions.

Voters' purpose in enacting Amendment 4 was to eliminate permanent disenfranchisement for the vast majority of affected Floridians by supplanting the discretionary clemency process with automatic rights restoration.

Before Amendment 4, Florida was one of just three states that permanently disenfranchised all citizens with felony convictions. Florida disenfranchised a higher percentage of its population than any other state and was responsible for more than 25 percent of the approximately 6.1 million U.S. citizens disenfranchised nationwide on the basis of convictions. Br. of Sentencing Project, *Hand v. Scott*, No. 18-11388, 2018 WL 3328534, at *3, 12 (11th Cir. Jun. 28, 2018). A person's ability to have

[27] The State faults the district court for considering only a single prong of this test. Br. at 64. But the district court ruled with respect to both the second and third prongs. A1142. And, the State has not previously contested prongs one or four. *Jones*, 950 F.3d at 832; State's Trial Br., Doc-336 at 10. These factors also support severability. *See* Pl's Opp. to Mot. to Dismiss, Doc-121 at 23-25; Pl.'s Trial Br., Doc-340 at 246; *Jones*, 950 F.3d at 832.

her civil rights restored rested solely upon the unfettered discretion of the Clemency Board. Fla. Const. art. IV, § 8; *see also* Fla. R. Exec. Clemency 4. The clemency process "moves at glacial speed," "reenfranchised very few applicants," and "[f]or the overwhelming majority . . . was an illusory remedy." A1040. As a result, the vast majority of Floridians with past felony convictions were permanently disenfranchised.

Amendment 4 added two provisions to the Florida Constitution. The first terminated disenfranchisement and automatically restored voting rights for people with felony convictions upon completion of "all terms of sentence." Fla. Const. art. VI, § 4(a). The second exempted people convicted of murder or a felony sexual offense from automatic rights restoration. Fla. Const. art. VI, § 4(b). Read as a whole, the overall purpose of the Amendment is clear: voters sought to end permanent disenfranchisement for the majority of Floridians with past convictions.[28]

This purpose can be accomplished independently of an LFO requirement. Indeed, enjoining the LFO requirement will ensure that Floridians with lower incomes are *not* permanently disenfranchised simply because they cannot pay their LFOs. Further, ending permanent disenfranchisement is sufficiently "compelling" such that it can be inferred that voters "would have approved the remainder of [Amendment 4] without the illegal [LFO requirement] had [they] appreciated the

[28] Amendment 4's principal sponsor agrees. Doc-173-1 at 6, 19.

deficiencies of the latter." *Schmitt v. State*, 590 So.2d 404, 415 (Fla. 1991). This Court would do "a grave disservice" in striking down the entire Amendment rather than severing its unconstitutional applications. *Id.*

B. The State's Myopic Analysis of Voters' Intent Fails To Consider the Amendment as a Whole.

The State contends that the overall purpose of Amendment 4 was to deny rights restoration to Floridians unless they are able to pay all of their LFOs. That analysis ignores the full text of the Amendment, and instead rests on the State's post-hoc interpretation of "completion of all terms of sentence" to require full payment of LFOs.[29] Fla. Stat. § 98.0751. "Whether a [provision] is severable is determined by 'its relation to the overall legislative intent of the [enactment] of which it is a part, and whether the [enactment], less the invalid provisions, can still accomplish this intent.'" *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1347 (11th Cir. 2004) (quoting *Martinez v. Scanlan*, 582 So.2d 1167, 1173 (Fla. 1991)). Instead of considering the Amendment as a whole, the State myopically focuses its analysis on a single part of a single phrase. But even assuming voters understood Amendment 4 to include an LFO requirement—they did not, *see supra* Factual Background Part

[29] The State has conceded that this is not the only interpretation of "completion of all terms of sentence" that would comply with the requirements of Amendment 4. *See* Doc-207 at 38-39. The legislators who sponsored SB7066 conceded that defining "completion" to mean conversion of LFOs to civil lien would satisfy Amendment 4. Senate Hr'g Tr. at 6:35:50-6:38:38, May 2, 2019.

II.F; *infra* Part IV.C—that does not establish that they would not have enacted Amendment 4 *but for* such a provision.[30]

The question is not whether voters would have preferred a rights restoration scheme that requires payment of LFOs to one that does not (though there is no evidence they would). Rather, the question is whether voters would have preferred a rights restoration scheme that does not unconstitutionally discriminate or impose a tax on voting over no rights restoration scheme at all. *See Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2210 (2020). And severability is not precluded simply because it is "impossible to be *certain* that the voters would have adopted the amendment had it not contained [the challenged] provisions." *Ray*, 742 So.2d at 1283.

"[I]t is far from evident" that voters would have preferred *no* rights restoration scheme to one in which the vast majority of citizens' rights are automatically restored upon completion of their sentence of incarceration, probation, parole, and

[30] If the mere inclusion of a provision were sufficient to demonstrate its inseverability, the severability doctrine would be unnecessary. Further, contrary to the State's assertions, enjoining the unconstitutional applications of an LFO requirement does not "write[] additional language" into the Amendment. Br. at 63. It simply prohibits the State from enforcing such a requirement as to costs and fees that constitute taxes and against those who are unable to pay. The State's logic would suggest that any time an unconstitutional application is found, the remedy would be to strike the entire statute because to do otherwise would "write additional" language into the statue cabining its application. As-applied challenges need not be remedied by facial invalidation.

payment of such fines and restitution as they are able to pay. *Seila Law*, 140 S. Ct. at 2210. Striking Amendment 4 entirely would retroactively strip eligible reenfranchised citizens of the right to vote and reinstate permanent disenfranchisement for over a million Floridians. It is "wholly implausible," *Coral Springs*, 371 F.3d at 1318, that voters would prefer this result. Voters "would prefer [this court] use a scalpel rather than a bulldozer in curing the constitutional defect" identified by the district court. *Seila Law,* 140 S. Ct. at 2211.

C. The District Court's Findings with Respect to Voters' Intent Are Not Clearly Erroneous.[31]

The State contends that a requirement that citizens pay their LFOs in full was critical to the voters' decision to enact Amendment 4. In support of this proposition, the State cites an Advisory Opinion obtained by the Governor over fourteen months after voters enacted Amendment 4, and a poll conducted several years prior, which

[31] Relying on a series of dissents by Justice Thomas, the State suggests that the district court's factual findings with respect to voters' purpose in enacting Amendment 4 are not due any deference because severability is a matter of statutory interpretation, and thus is a question of law not fact. Br. at 64-65. Not so. *Jones*, 950 F.3d at 832 n. 15 (citing *Jones v. Smith*, 474 F. Supp. 1160, 1168 (S.D. Fla. 1979) ("The severability of any particular portion of a statute is a mixed question of law and fact to be determined by the trial court with appropriate review of the conclusion in the appellate court.")). In any event, the State itself relies on factual assertions proven unreliable at trial—not the text of Amendment 4—to argue voter intent.

itself did not disaggregate payment of LFOs from the exclusion of people convicted of murder or sexual offenses. *See* Br. at 64-65; A1144.

The State does not dispute that the polling it relies upon was unscientific, unreliable, and "conducted years before Amendment 4 was on the ballot." A1144. Nor does it dispute that

> none of the focus groups and polling dealt separately with financial obligations. There were only fleeting references to these, and only in tandem with completion of all terms in prison or on supervision. The focus groups and polling did not address inability to pay at all. They provided no information on how a requirement to pay fines, fees, or costs, or even restitution, would have affected the vote, let alone how a requirement for payment by those unable to pay would have affected the vote.

Id. at 42. Nor does it offer any reason why these findings were erroneous, or even why a review by this Court *de novo* would lead to a different result. Indeed, the expert testimony unequivocally supports the district court's finding. *See* A1143. The district court did not credit the State's expert's testimony because it fell apart upon the slightest scrutiny. *Id*; *see Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985) (explaining that findings "based on determinations regarding the credibility of witnesses [are due] even greater deference"). But even the State's expert acknowledged that the proposition that voters would not have enacted Amendment 4 but for an LFO requirement was entirely speculative. Doc-363-2 at 84-85. And the plaintiffs' expert, whom the district court did credit, A1142, established that the State's assertion that stale survey data proves that voters would not have enacted

Amendment 4 but for an LFO requirement is not supported by any accepted academic theory or methodology. Doc-360-43 at 22-25.

The State must show more than mere "doubt [as to] whether the amendment would have passed without the [challenged] provisions." *Ray*, 742 So. 2d at 1281. But the State put forward no credible evidence that the average voter would have known that sentences always include financial requirements, nor did it put forward any evidence as to what voters understood was meant by "completion" of such requirements or how they would apply to those genuinely unable to pay. With the benefit of a full record, the district court found that "[t]he materials available to voters in advance of the election, whether in sample ballots or public service materials [] from proponents or in the media, included very few references to financial obligations, and fewer still to anything other than restitution." A1144. The State offers no reason why these findings should be overturned. Instead, it offers no more than "conjecture and speculation," *Ray*, 742 So.2d at 1283. That is insufficient to preclude severability. *Id.*

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In 2018, Florida voters chose second chances and to restore the right to vote to their neighbors. Having done so, Florida "cannot keep the word of promise" to indigent citizens only to "break it to their hope," *Griffin*, 351 U.S. at 24, all in the service of a scheme that the State cannot even begin to administer. Voting rights

restoration is assuredly "in the category of cases in which the State may not 'bolt the door to equal justice.'" *M.L.B.*, 519 U.S. at 568.

CONCLUSION

For the foregoing reasons, the district court's injunction should be affirmed.

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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 16,242 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

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Dated: August 3, 2020

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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 August 3, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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