UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

KELVIN LEON JONES *et al.*,

Plaintiffs,

v. Case No.4:19cv300-RH/MJF

RON DeSANTIS *et al.*,

Defendants.
_______________________________________/

GOVERNOR AND SECRETARY'S RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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I. Introduction and Statement of Case

A. This case concerns the standards for felon re-enfranchisement—not burdens on the right to vote. Felons forfeit their right to vote under Florida law when they chose to commit their crimes. *See* Fla. Const. art. VI, § 4(a); Fla. Stat. § 97.041(2)(b) (2019). "Having lost their voting rights, [felons] lack any fundamental interest to assert." *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010), *cert. denied*, 563 U.S. 1008 (2011). Case after case thus makes clear that felon disenfranchisement and any subsequent felon re-enfranchisement schemes are distinct from restrictions on the fundamental right to vote. *Id.*; *see also Richardson v. Ramirez,* 418 U.S. 24 (1974); *Johnson v. Governor of the State of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc); *Shepherd v. Trevino*, 575 F.2d 1110, (5th Cir. 1978). *Accord Valenti v. Lawson,* 889 F.3d 427 (7th Cir. 2018); *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010); *Hayden v. Pataki,* 449 F.3d 305 (2d Cir. 2006); *Thompson v. Alabama*, 293 F. Supp. 3d 1313 (M.D. Ala. 2017); *Harness v. Hosemann,* Case No. 3:17-cv-00791, DE 91 (N.D. Miss. Aug. 7, 2019); *Madison v. State*, 163 P. 3d 757 (Wash. 2007).

Indeed, as the Eleventh Circuit and this Court recently recognized, "it is well-settled" that section 2 of the Fourteenth Amendment allows states to "disenfranchise convicted felons," even "permanently." *Hand v. Scott,* 888 F. 3d 1206, 1213 (11th Cir. 2018) (quoting this Court).

B. While constitutionally permissible, the State of Florida does not permanently disenfranchise anyone. The Florida Constitution restores the right to vote for felons through one of two avenues.

The first avenue is the clemency process through which "the governor may, . . . with the approval of two members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses." Fla. Const. art. IV, § 8(a); *see also* Fla. Stat. § 944.292(1) (2019). That avenue has long since been found constitutional. *See Beacham v. Braterman,* 300 F. Supp. 182, 183 (S.D. Fla. 1969), *aff'd* 396 U.S. 12 (1969).

The second avenue "terminate[s]" "any disqualification from voting arising from a felony conviction . . . *upon completion of all terms of sentence* including parole or probation." Fla. Const. art. VI, § 4(a) (emphasis added). "No person convicted of murder or a felony sexual offense" qualifies for this second avenue. Fla. Const. art. VI,§ 4(b). As the Governor and Secretary explain in their Motion to Dismiss, none of the Plaintiffs challenge this most recent constitutional provision's requirement that felons satisfy "all terms of sentence." *See* ECF 97.

C. The Plaintiffs challenge only the Florida Legislature's statutory definition of the phrase "[c]ompletion of all terms of sentence." 2019-162 Fla. Laws § 25 (codified at Fla. Stat. § 98.0751 (2019)). The statutory definition includes, among other things, "[f]ull payment of restitution ordered to a victim by

the court as part of the sentence," and "payment of fines or fees ordered by the court as a part of the sentence or that are ordered by the court as a condition of any form of supervision . . . ." Fla. Stat. § 98.0751(2)(a)5 (2019). Several alternatives are provided for those who cannot pay the financial obligations included as part of their criminal sentence. *Id.* §§ 98.0751(2)(a)5.d. (modification by court), e. II. (through victim or other payee's approval), e. III (through completion of community services if court "converts financial obligation to community service").

The Florida Legislature's definition is firmly moored to the constitutional text, the framers' intent as expressed to the Florida Supreme Court *before* the text was submitted to the voters, and the Florida Rights Restoration Coalition,[1] Latino Justice, the League of Women Voters of Florida, and the ACLU of Florida's position as expressed to the Secretary of State *after* voters decided to add the text to the Florida Constitution. *See generally W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 8–9 (Fla. 2012) (explaining that questions concerning "the meaning of a constitutional provision must begin with the examination of that provision's explicit language" but where "the provision's language is ambiguous or does not address the exact issue, a court must endeavor to construe the constitutional

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[1] Desmond Meade signed the letter on behalf of the Florida Rights Restoration Coalition. App. at 4. Mr. Meade was also chairperson of the proponents of the constitutional text, Floridians for Fair Democracy, Inc. *See generally* https://dos.elections.myflorida.com/committees/ComDetail.asp?account=64388.

provision in a manner consistent with the intent of the framers and the voters") (citations omitted)).

First, the legislative definition tracks the plain language of the Florida Constitution. "All terms of sentence" is defined such that "all" means all and includes financial obligations owed to the victims (like restitution) or the State (like fines, fees, and costs). This legislative definition also comports with Florida Supreme Court precedent holding that the Florida Constitution's use of the word "including" signals only "an illustrative application of general principal" and not "an exhaustive description" that limits the phrase to parole or probation. *Pro-Art Dental Lab v. V-Strategic Grp.*, 986 So. 2d 1244, 1257 (Fla. 2008) (citing *Fed. Land Bank of St. Paul v. Bismark Lumber Co.*, 314 U.S. 95, 100 (1941)).

Second, the legislative definition tracks the colloquy between the constitutional text's proponents—its framers—and Justices of the Florida Supreme Court. The proponents assured the Florida Supreme Court that the proposed constitutional amendment presented a "fair question" and "clear explanation" to Florida voters. Transcript of Oral Argument at 2, *Advisory Op. to the Attorney Gen. Re: Voting Restoration Amendment*, 215 So. 3d 1202 (Fla. 2017).[2]

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[2] The Governor and Secretary include a certified transcript in the appendix attached to this Response. *See* App. at 14–41. The Transcript of Oral Argument is also available here: https://wfsu.org/gavel2gavel/transcript/pdfs/16-1785_16-1981.pdf. A video of the oral argument is available here: https://wfsu.org/gavel2gavel/viewcase.php?eid=2421&jwsource=cl.

Addressing Justice Polston's question as to whether "completion of [all] terms" includes "full payment of any fines," the proponents responded, "[y]es, sir . . . all terms means all terms within the four corners." *Id.* at 4. When Justice Lawson asked, "[y]ou said that terms of sentence includes fines and costs . . . that's the way it's generally pronounced in criminal court. Would it also include restitution when it was ordered to the victim as part of the sentence?" *Id.* at 10. The proponents answered: "Yes." *Id.* Justice Pariente further commented that the inclusion of fines, fees, and restitution as part of the sentence "would actually help the [S]tate because if fines, costs and restitution are a requirement . . . for those that want to vote, there's a big motivation to pay unpaid costs, fines and restitution." *Id.* at 11. Justice Pariente's comment presupposed that "all terms of sentence" includes financial obligations imposed as part of the sentence. *See id.*

Third, the legislative definition of the constitutional phrase "all terms of sentence" is consistent with the letter sent on December 13, 2018, to the Secretary of State by the League of Women Voters of Florida (a Plaintiff here), the ACLU of Florida (counsel for some of the Plaintiffs here), and others.[3] That letter asked the State to adopt the following interpretation of the Florida Constitution's text:

> The phrase "completion of all terms of sentence" includes any period of incarceration, probation, parole *and financial obligations imposed as part of an individual's sentence. These financial obligations may*

[3] The others included the chairperson of the constitutional text's sponsor, albeit in a different capacity.

> *include restitution and fines, imposed as part of a sentence or a condition of probation under existing Florida statute*. Fees not specifically identified as part of a sentence or a condition of probation are therefore not necessary for "completion of sentence" and thus, do not need to be paid before an individual may register. We urge the Department to take this view in reviewing the eligibility of individuals registered to vote as outlined in Chapter 98, Florida Statutes.

App. at 3 (emphasis added). The Florida Legislature obliged.

If anything, the Florida Legislature's definition of the phrase "all terms of sentence" is more generous than the interpretation sought by the proponents of the constitutional text. Unlike the Florida Constitution, the statute limits the phrase to the pronouncements contained "in the four corners of the sentencing document." Fla. Stat. § 98.0751(2)(a) (2019). The statute allows a court to convert financial obligations associated with a criminal sentence into community service hours and then consider those financial obligations to be met upon completion of the community service hours, thereby providing an alternative for indigents. *Id.* § 98.0751(2)(a)5.e.(III). The statute also allows a court, "[u]pon a payee's approval," to terminate "any financial obligation to a payee, including, but not limited to, a victim, or the court." *Id.* § 98.0751(2)(a)5.e.(II). And the statute requires strict construction of the statutory language such that "[i]f a provision is susceptible to differing interpretations," the language "be construed in favor of the registrant." *Id.* § 98.0751(4).

D. On August 9, 2019, "to ensure the proper implementation of Article VI, section 4 of the Florida Constitution," and discharge his duties, the Governor asked the Florida Supreme Court for an advisory opinion concerning the meaning of "all terms of sentence." App. at 5. On August 29, 2019, the Florida Supreme Court issued an order stating that "[t]he Court has determined that the [Governor's] request is within the purview of [article IV, section (1)(c) of the Florida Constitution] and the Court will exercise its discretion to provide an opinion in response to the Governor's request." App. at 13. Oral argument before the Florida Supreme Court is scheduled for November 6, 2019. App. at 13.

E. Meanwhile, briefing before this Court on the Governor and Secretary's Motion to Dismiss continues through September 23, 2019. Briefing on the Plaintiffs' Motion for Preliminary Injunction continues as well. The Plaintiffs allege in their Memorandum of Law in Support of the Motion for Preliminary Injunction that the legislative definition of the phrase "all terms of sentence": violates the Twenty-Fourth Amendment to the U.S. Constitution because satisfaction of legal financial obligations constitute a "poll tax"; violates the Fourteenth Amendment because it conditions the right to vote on the payment of fees included as part of a criminal sentence; violates the Fourteenth Amendment because it penalizes felons for their inability to satisfy the financial obligations included as part of their criminal sentence; unduly burdens the right to vote for

those who forfeited their right to vote through the commission of a felony; violates the Fourteenth Amendment's Equal Protection Clause when subjected to rational basis review; violates the Fourteenth Amendment's Equal Protection Clause because it strips felons of their voting rights; and violates the Fourteenth Amendment's Due Process Clause because Florida allegedly strips the right to vote without making available public data to determine outstanding financial obligations imposed as part of a criminal sentence. ECF 98-1 at 46–79. All other arguments have been waived for purposes of the preliminary injunction. *See Bank of Am., N.A. v. Mukamai (In re Egidi)*, 571 F.3d 1156, 1163 (11th Cir. 2009).

F. Finally, at this time, people who believe that they have satisfied "all [financial] terms of sentence" may continue registering to vote.

Most Floridians can register to vote using one of three approved forms, two of which are relevant here. App. at 123, ¶ 5.[4] Available before the relevant change to the Florida Constitution, the older but still acceptable version of the form asks the registrant to affirm the following: "I affirm that I am not a convicted felon, or if I am, my rights relating to voting have been restored." App. at 123–24, ¶ 6. A newer version of the form asks registrants to choose from one of three statements: (1) "I affirm I have never been convicted of a felony," (2) "If I have been

[4] The third is the federal postcard application prescribed by the U.S. Department of Defense's Federal Voting Assistance Program. It is not relevant here and therefore not discussed.

convicted of a felony, I affirm that my voting rights have been restored by the Board of Executive Clemency," or (3) "If I have been convicted of a felony, I affirm my voting rights have been restored pursuant to s. 4, Art. VI of the State Constitution upon the completion of all terms of my sentence, including parole or probation." App. at 124, ¶ 6.[5]

Once a registrant submits a form, the Florida Department of State or relevant supervisor of elections compares information on the form to ensure that the social security number, driver's license or identification number corresponds with information for an actual person. App. at 125, ¶ 10; *see also* Fla. Stat. §§ 98.045(1), 97.053(2), (5)—(6) (2019). Other affirmations are taken as true and correct and the person is added to the voter rolls.

Once added to the voter rolls, the Department of State compares the voter's salient information against information provided by the Florida Department of Law Enforcement, the Florida Department of Corrections, the Florida Clerk of Courts, and the U.S. Attorney and federal courts. App. at 126, ¶ 11; *see also* Fla. Stat. §§ 98.075(5), 98.093(2) (2019). Felony convictions are flagged. App. at 126, ¶ 12. That information is then checked against information available from the Florida

[5] Florida Statute § 97.052(2)(t) now requires that voter registration forms ask these three questions. The Department of State has initiated rulemaking to ensure that its pre-existing rules comply with the statute. In the interim, the Department is accepting both forms.

Commission on Offender Review to assess whether the Governor and Cabinet have provided clemency. App. at 126, ¶ 11; Fla. Stat. § 98.075(5). *This process remains unchanged despite the inclusion of the new constitutional text concerning "all terms of sentence."* *See* Fla. Stat. § 98.075(5) (2019).

Since inclusion of the constitutional text, the State considers additional information as well. The State considers whether a registrant is currently in prison or Department of Corrections custody because of a felony. App. at 129, ¶ 20. If so, this is credible and reliable information that "all terms of sentence" have not been completed. App. at 129, ¶ 20. The State considers whether those not in custody were convicted of a murder or a felony sexual offense conviction. App. at 129, ¶ 21. If so, and assuming no clemency was granted, this is credible and reliable evidence of ineligibility to register. App. at 129, ¶ 21. Where a registrant was convicted of a felony other than murder or felony sexual offense but was not granted clemency, the State does a further assessment about whether "all terms of sentence," including financial obligations, have been satisfied. App. at 129, ¶ 22. Only credible and reliable information regarding unmet terms and obligations would then be sent to the supervisors of elections who then make a final decision as to whether to remove an ineligible voter. App. at 129, ¶¶ 20–22. Currently, the State is reviewing credible and reliable information available regarding a registrant's potential outstanding financial obligations and is actively soliciting

public comment and input on developing an improved system to benefit the State *and* voters. *Cf.* Fla. Stat. § 98.075(5) ("If the department determines that the information is *credible and reliable*, the department shall notify the supervisor and provide a copy of the supporting documentation indicating the potential ineligibility of the voter to be registered." (emphasis added)).

To reiterate, removal from the voter rolls requires credible and reliable information. App. at 129, ¶¶ 20–22. Removal is governed by a strict statutory process that guarantees notice and an opportunity to be heard—and even the chance for appeal—*before* removal. *See* Fla. Stat. § 98.075 (2019). If a supervisor of election has credible and reliable evidence that a registered voter may no longer be eligible to vote, the supervisor has seven days to notify the voter through certified or verifiable mail of the basis of this determination. *Id.* at § 98.075(7)(a)(1). If the mailed notice was undeliverable, the supervisor must publish notice of the voter's potential ineligibility in a newspaper. *Id.* at § 98.075(7)(a)(2). The voter then has thirty days to respond, and the voter may also request a hearing with the supervisor. *Id.* at § 98.075(7)(a)(1)(b), (d); *see also* § 98.075(7)(a)(2)(c), (d). The supervisor must inform the voter of the hearing's location and time. *Id.* at § 98.075(7)(a)(5). The voter may present evidence of the voter's eligibility. *Id.* After the hearing, the supervisor must determine whether

the voter is eligible and must inform the voter of this determination. *Id.* A voter can appeal the supervisor's determination of ineligibility. *Id.* at § 98.075(7)(b)(5).

To date, the Governor and Secretary are unaware of anyone being removed from the voter rolls because of that person's failure to pay the financial obligations included as part of the sentence. While they sue to prevent this very occurrence, the Plaintiffs provide no evidence showing that a supervisor has removed someone from the voter rolls for non-payment of financial obligations imposed as part of a criminal sentence. This is the status quo being challenged.

II. Standard for Preliminary Injunction

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395 (1981). "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." *Keister v. Bell,* 879 F.3d 1282, 1287 (11th Cir. 2018) (collecting citations). The four requisites the Plaintiffs "must clearly establish" are: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the [P]laintiff[s] outweighs the potential harm to the [D]efendant; and (4) that the injunction will not disservice the public interest." *Id.* (citations omitted). Notably, the rule governing preliminary injunctions "does not place upon the [non-

moving party] the burden of coming forward and presenting its case against a preliminary injunction." *Alabama v. U.S. Army Corps of Eng'rs,* 424 F.3d 1117, 1136 (11th Cir. 2005) (quoting *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70,* 415 U.S. 423, 442 (1974)).

III. Argument

The Plaintiffs have not met their burden on any of the four requisites for a preliminary injunction. The Plaintiffs cannot succeed on the merits because their arguments rely on the false assumption that the Florida Constitution automatically restored voting rights for those who have *not* completed "all terms of sentence." There is no irreparable harm because felon re-enfranchisement fails to rise to the level of a fundamental right. The status quo otherwise causes the Plaintiffs no harm. And the public interest is furthered by giving effect to the words people voted for on November 6, 2018—not changing the meaning of those words after the fact—and by implementing the requirements for re-enfranchisement imposed by the Florida law.

A. No likelihood for success on the merits.

The Plaintiffs cannot succeed on the merits. First, the Plaintiffs lack standing, and abstention is appropriate here. Second, federal and state courts agree that asking felons to satisfy the financial obligations imposed as part of their criminal sentence does not violate the Twenty-Fourth Amendment. Third, there is

no violation of the Fourteenth Amendment's Equal Protection Clause for wealth-based discrimination. Florida law only requires felons to complete all the terms of their sentence and creates alternatives for those who cannot pay. Fourth, there is no burden on the right to vote because, again, this case concerns re-enfranchisement and not voting rights. People forfeit their right to vote when they commit a felony. Fifth, there is no violation of the Due Process Clause. Felons should know the financial obligations *they* owe; the State has in place a careful and deliberate process for voter removal; and State of Florida is working towards improving the consolidation of credible and reliable information for use in determining voter eligibility for the benefit of the State *and* registrants.

1. Plaintiffs lack standing and abstention is appropriate.

The Governor and Secretary will not repeat in its entirety the argument in their Motion to Dismiss. *See* ECF 97. Suffice it to say that the Plaintiffs cannot satisfy the redressability prong for Article III standing because they are not challenging the Florida Constitution's requirement that felons satisfy "all terms of sentence" before the franchise is restored. Even if the Plaintiffs succeed in their challenge to the state statute that tracks the constitutional text, the constitutional text would still preclude felons from registering to vote. Thus, the Plaintiffs' claims are not redressable. *See Fla. Family Policy Council v. Freeman*, 561 F.3d 1246, 1255–56 (11th Cir. 2009).

Were the Plaintiffs to challenge the Florida Constitution's use of the phrase "all terms of sentence" and succeed, they would find that the phrase is not severable. As the Governor and Secretary will further explain in their Reply in Support of the Motion to Dismiss, the four-part test for severability in *Ray v. Mortham*, 742 So. 2d 1276, 1281 (Fla. 1999), cannot be met. The phrase "all terms of sentence" is inextricably intertwined with the rest of the proposed constitutional amendment that the Florida Supreme Court considered, and the voters chose to include it in the Florida Constitution. The phrase is a condition that must be satisfied before the franchise is restored. The Plaintiffs have not—and cannot—show that voters would have approved the proposed amendment without the phrase. Stated differently, the Plaintiffs do not provide any evidence showing that the voters would, for example, want to re-enfranchise someone who stole another person's life-savings and has yet to repay that debt. This cannot be true given the other choices the voters made on November 6, 2018. *See* Art. I, § 16 (approved by the voters on November 6, 2018); App. at 89.

Thus, the phrase at issue is not severable from the constitutional amendment. If the phrase is struck, reversion to the pre-2018 status quo would result. Clemency would become the only avenue to re-enfranchisement.

Regardless, "[s]everability is a question of state law" for the Florida Supreme Court to decide. *Jones v. Bates*, 127 F.3d 839, 863 (9th Cir. 1997)

(quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985)). In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 785 n.1 (1995), the U.S. Supreme Court did not disturb the Arkansas Supreme Court's severability analysis concerning a constitutional amendment that voters added to the Arkansas Constitution. The Eighth Circuit in *Gralike v. Cook*, 191 F.3d 911, 926 n.12 (8th Cir. 1999), also "refuse[d]" to undertake a severability analysis when reviewing a provision of the Missouri Constitution. The Eighth Circuit explained that "[s]uch micro-management of the Missouri Constitution would entangle [the Eighth Circuit] too much in State law issues." *Id.* The Eighth Circuit "opt[ed] instead to abstain from such action." *Id.*; *cf. State v. Catalano*, 104 So. 3d 1069, 1081 (Fla. 2012) ("Accordingly, in striving to show great deference to the Legislature, this Court will not legislate and sever provisions that would effectively expand the scope of the statute's intended breadth.").

Abstention is especially appropriate here. There is a parallel proceeding before the Florida Supreme Court concerning the meaning of the phrase "all terms of sentence." If the Florida Supreme Court agrees that the phrase means what it says—that the state constitution encompasses financial obligations imposed as part of the criminal sentence—this might well be the end of the federal proceedings. But if the Florida Supreme Court disagrees with the State's interpretation, then the alleged burdens on the Plaintiffs might well be resolved without addressing the

federal constitutional issues. Deferring to the Florida Supreme Court would thus serve the principle of constitutional avoidance, further judicial economy, and promote federal-state comity. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–18 (1976) (granting a federal court discretion to abstain where there are ongoing state court proceeding).

2. *There is no violation of the Twenty-Fourth Amendment.*

The Plaintiffs' substantive arguments fail on the merits as well. There is no claim under the Twenty-Fourth Amendment. That amendment provides in relevant part that "[t]he right of citizens . . . 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, § 1. Requiring felons to satisfy the financial obligations imposed as part of their sentence is *not* a poll tax. Every court—state and federal—confronted with the issue has said so.

The district court in *Thompson* summarized recent precedent on Twenty-Fourth Amendment challenges on to re-enfranchisement schemes as follows:

> Several courts, including the Sixth Circuit, have reasoned persuasively that requiring full payment of criminal fines and restitution as a condition of re-enfranchisement does not amount to a poll tax because the fines are terms of the sentence that "Plaintiffs themselves incurred." *Johnson v. Bredesen*, 624 F.3d 742, 751 (6th Cir. 2010); *see also Harvey*, 605 F. 3d at 1080 ("That restoration of [convicted felons'] voting rights requires them to pay all debts owed under their criminal sentences does not transform their criminal fines into poll taxes.").

> In *Bredesen*, convicted felons who had served their prison sentences and had satisfied the conditions of supervised release were ineligible under Tennessee law to register to vote because they owed past-due child support payments or restitution to the victims of their criminal offenses. Affirming a judgment on the pleadings for the defendants, the Sixth Circuit held that, "even if the Twenty-Fourth Amendment applied to Tennessee's re-enfranchisement law, the provisions requiring payment of restitution and child support do not represent taxes on voting imposed by the [S]tate, and therefore do not violate the Amendment's terms." *Bredesen*, 624 F. 3d at 751. In other words, "restitution and child-support-payment provisions fail to qualify as the sort of taxes the Amendment seeks to prohibit." *Id.*; *see also Johnson v. Bredesen*, 579 F. Supp. 2d 1044, 1059 (M.D. Tenn. 2008) ("Imposing a requirement that convicted felons comply with … outstanding court orders cannot reasonably be construed as a 'tax' on voting."), *aff'd*, 624 F. 3d 742 (6th Cir. 2010); *Coronado v. Napolitano*, No. CV-07-1089-PHX-SMM, 2008 WL 191987, at *4–5 (D. Ariz. Jan. 22, 2008) (finding that Arizona's re-enfranchisement law did not "make ability to pay 'an electoral standard,' but limit[ed] re-enfranchisement to those who ha[d] completed their sentences—including the payment of any fine or restitution imposed").

293 F. Supp. 3d at 1332–33. Florida's policy of requiring felons to satisfy the financial obligations imposed as part of their sentence is indistinguishable from the requirements upheld in Alabama, Arizona, Tennessee, and Washington. *See generally* Fla. Stat. § 98.0751(2)5.c. (2019) (requiring payment of "only the amount specifically ordered by the court as part of the sentence").

The Plaintiffs cannot point to a contrary case. This is for good reason. As the Ninth Circuit stated in *Harvey*, "Plaintiffs' right to vote was not abridged because they failed to pay a poll tax; it was abridged because they were convicted of felonies." 605 F.3d at 1080. So requiring the Plaintiffs "to pay all debts owed under their criminal sentences does not transform their criminal fines into poll taxes." *Id.* Put another way, in the words of the Washington Supreme Court, a financial obligation "should not be divorced from the context in which that [obligation] arose, which was as a result of the individual's commission of a felony." *Madison*, 163 P.3d at 771. Financial obligations are "not merely a condition for reinstatement of voting rights," they are "requirement[s] that felons must satisfy to complete the terms of their sentences." *Id.*

Thus, there is no Twenty-Fourth Amendment claim or violation here. The statute now being challenged "does not deny or abridge any rights; it only restores them." *Johnson*, 624 F.3d at 751.

3. There is no violation of the Fourteenth Amendment's Equal Protection Clause.

Nor is there a violation of the Fourteenth Amendment's Equal Protection Clause. "The Equal Protection Clause prevents states from making distinctions that (1) burden a fundamental right; (2) target a suspect class; or (3) intentionally treat one individual differently from others similarly situated without any rational basis." *Id.* at 746 (citations omitted). "Having lost their voting rights, Plaintiffs

lack any fundamental interest to assert." *Id.* And wealth-based classifications do not affect any suspect class. *Id.*; *see also Papasan v. Allain*, 478 U.S. 265, 283–84 (1986). Rational basis review is all that is left. *See Shepherd*, 575 F.2d at 1114–15. Such review requires courts to uphold state action "if there is any reasonably conceivable state of facts that could provide a rational basis for classification." *FCC v. Beach Commc'n*, 508 U.S. 307, 313 (1993).

The statutory definition of the phrase "all terms of sentence" passes rational basis. As an initial matter, the definition restores rights, it does not deprive anyone of any rights. Regardless, as Justice O'Connor, writing for the Ninth Circuit said in *Harvey*, the State "has a rational basis for restoring voting rights only to those felons who have completed the terms of their sentences, which includes payment of fines or restitution" to victims. 605 F.3d at 1079; *see also Johnson*, 624 F.3d at 747 ("Certainly, Tennessee possesses valid interests in . . . requiring criminals to fulfill their sentences, and encouraging compliance with court orders," which are sufficient "to supply a rational basis").[6]

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[6] Although referenced in some of the Complaints, the Memorandum in Support of Preliminary Injunction does not argue that Florida's re-enfranchisement scheme "ha[s] *both* the purpose and effect of invidious discrimination" against a particular race. *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018). Such an argument would have, of course, triggered a separate two-part test and burden-shifting regime. *Thompson*, 293 F. Supp. 3d at 1321 (quoting *Hunter v. Underwood*, 471 U.S. 222, 227–28 (1985)); *see also Johnson*, 405 F.3d at 1223. For purposes of the preliminary injunction, the Plaintiffs have waived this argument. Given the legislative history, the argument is worth abandoning. *See* App. 107–21. But the

While not required, the state statute implementing the new state constitutional provision also narrowly tailors the definition of "all terms of sentence" to guard against withholding re-enfranchisement from those unable to satisfy their financial obligations. Among other things, the statute provides that:

- "[O]nly the amount [of any financial obligations] specifically ordered by the court as part of the sentence" must be paid before restoration of the voting rights. Fla. Stat. § 98.0751(2)(a)5.c. (2019).
- "[A]ny fines, fees, or costs that accrue after the date the obligation is ordered as part of the sentence," are expressly excluded as from the restoration analysis. *Id.*
- "[A] court may not be prohibited from modifying the financial obligations of an original sentence . . . ." *Id.* § 98.0751(2)(a)5.d.
- Courts may, in fact, "modif[y] the original sentencing order to no longer require completion" of a financial obligation, including "conver[sion] of the financial obligation to community service." *Id.* § 98.0751(2)(a)5.e.(III).
- And "any financial obligation to a payee, including . . . a victim, or the court," may be "terminat[ed]" "[u]pon the payee's approval,"

Governor and Secretary reserve the right to respond at a later time to any such argument if the case progresses past the pleading and preliminary injunction stage.

"through the production of a notarized consent by the payee," or "appearance in open court . . . ." *Id.* § 98.0751(2)(a)5.e.(II).

Taken together, the statutory alternatives for those truly unable to pay their financial obligations lend further support for Florida's re-enfranchisement scheme. *Cf. Harvey*, 605 F.3d at 1080 (stating but not addressing the following: "Perhaps withholding voting rights from those who are truly unable to pay their criminal fines due to indigency would not pass the rational basis test").

Thus, the state statute being challenged readily passes rational basis review under the Fourteenth Amendment's Equal Protection Clause.

4. There is no burden on the right to vote.

Any attempt to shoehorn these felon re-enfranchisement cases into the *Anderson-Burdick* framework must also fail. While *Anderson-Burdick* provides a flexible framework where federal courts "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,'" the test is not a constitutional catchall that subsumes felon re-enfranchisement claims. *Burdick v. Takushi*, 504 U.S. 429, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789(1983)). *Anderson-Burdick* applies only when "evaluat[ing] a law respecting the right to vote. . . ." *Crawford v. Marion Cty. Election Bd.*, 553

U.S. 181, 204 (2008) (Scalia, J., concurring). *Anderson-Burdick* does not apply to felon re-enfranchisement because felons have no right to vote unless and until they satisfy all applicable requirements. *See supra*.

The Plaintiffs' arguments to the contrary begin and end with the false assumption that the Florida Constitution automatically restored the right to vote for felons regardless of whether they satisfied "*all* terms of sentence." The Florida Constitution did no such thing. *See supra*. Felons must satisfy the financial obligations imposed as part of their criminal sentence. Without satisfaction of all terms, *some* of the criminal sentence remains outstanding and the state constitution bars re-enfranchisement. But even if *Anderson-Burdick*'s balancing test applies, it tilts in the State's favor. As discussed in the Equal Protection Clause discussion above, the State of Florida has a legitimate and compelling interest in ensuring that felons satisfy *all* of the terms of their criminal sentence, including financial obligations like restitution to victims.

Thus, there is no undue burden claim under *Anderson-Burdick*. Having forfeited the right to vote, one cannot then sue alleging that the state is burdening that right. Re-enfranchisement must come first.

5. <u>There is no violation of the Fourteenth Amendment's Due Process Clause</u>.

Finally, there is no cognizable Due Process Clause claim. "The procedural protections required by the Due Process Clause must be determined with reference

to the rights and interests at stake in the particular case." *Washington v. Harper*, 494 U.S. 210, 229 (1990). The factors that guide this review under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), require this Court to "consider the private interests at stake in a governmental decision, the governmental interests involved, and the value of procedural requirements in determining what process is due under the Fourteenth Amendment." *Washington*, 494 U.S. at 229 (citation omitted).

The Plaintiffs argue that the state statute requiring completion of "all terms of sentence," like the state constitution, violates the Due Process Clause because it has the potential to cause an erroneous deprivation of the right to vote. Not so. Three points are relevant here.

First, any deprivation of the right to vote occurs when one is convicted of a felony. *See* Fla. Const. art. VI, § 4(a); Fla. Stat. § 97.041(2)(b) (2019). Plaintiff, Sheila Singleton, exploited the elderly and was ordered to pay restitution to her victims as a part of her sentence. App. at 42. Plaintiff, Keith Ivey, was adjudicated guilty of violating the State's racketeering laws, conspiracy to violate RICO, criminal use of someone else's personal identification, and other crimes. App. at 51–52. Among the terms of his sentence, Ivey was required to pay restitution to the victims of his crime. App. at 65. Plaintiff, Betty Riddle possessed cocaine, sold cocaine, and had court fees and costs assessed against her in the 1990s and early 2000s. App. at 67–69. Plaintiff, Emory Mitchell, was tried

and found guilty of battery on a law enforcement officer. App. at 70. There is no argument being made that the State violated the due process rights of Singleton, Ivey, Riddle, Mitchell or others in convicting them of their crimes, which triggered forfeiture of the right to vote.

Rather, the Plaintiffs challenge the state statute that *restores* the right to vote. As such, the Plaintiffs fail to ground their due process claim in the *deprivation* of an identifiable right or interest. *See Osborne v. Folmar*, 735 F.2d 1316, 1317 (11th Cir. 1984) ("dispos[ing] of the procedural due process claim" of the plaintiff because of "[t]he lack of any liberty interest in or right or entitlement to the exercise of the pardon power in any particular way"); *cf. Beacham*, 300 F. Supp. at 184 (holding that Florida's clemency process for felon re-enfranchisement complies with the Due Process Clause).

Second, individuals convicted of the crime are in as good a position as anyone else to review the four-corners of their sentencing document and know how much of their financial obligations remain outstanding.[7] They know where they

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[7] The Plaintiffs' void for vagueness argument fails for this very reason. State law cannot be void for vagueness when an individual's own criminal records—which the individual is in as good a position as anyone else to have—serve as the basis for re-enfranchisement. *See United States v. Evans*, 883 F.3d 1154, 1169 (9th Cir. 2018) (Ikuta, J., dissenting) (arguing that a void for vagueness challenge to a supervised release condition is inappropriate when a criminal defendant "knows how the condition applies [to him] because [of his] intimate knowledge of his own 'criminal history,' 'criminal record,' and 'personal history'").

were convicted. They know when they were convicted. They can call the relevant clerks of court to determine outstanding fees and costs. And they should keep track of the restitution already paid to victims of their crime. Attestations before this Court suggest that individuals are capable of tracking information. If these individuals then believe that they have satisfied "all terms of sentence," they may affirm as much on their voter registration form free from the fear of prosecution especially given the mens rea element for a violation of Florida law. *See, e.g.,* Fla. Stat. § 104.011(2) (2019) ("A person who willfully submits any false voter registration information commits a felony of the third degree . . . ."); *id.* § 104.011(3) ("A person may not be charged or convicted for a violation of this section for affirming that he or she has not been convicted of a felony or that, if convicted, he or she has had voting rights restored, if such violation is alleged to have occurred on or after January 8, 2019, but before July 1, 2019."); *id.* § 837.02(1) (defining perjury in official proceedings as, among other things, the "mak[ing] of a false statement, which [the person] does not believe to be true").

Third, the State of Florida provides a robust statutory process before removing anyone from the voter rolls. It is worth repeating that the statute at issue charges the Department of State with initially reviewing each person who registers to vote for eligibility under Article VI, section 4 of the Florida Constitution. *See* Fla. Stat. § 98.075(5) (2019). The Department then forwards its initial

determination and information to the applicable local supervisor of elections. *Id*. The local supervisor must verify the initial information and make a determination regarding eligibility of the voter under Article VI, section 4 of the Florida Constitution. Fla. Stat. § 98.075(7) (2019). Any such determination of ineligibility triggers a pre-existing process that Plaintiffs do not challenge. This process includes noticing the voter by mail within 7 days of receipt of information related to eligibility, a statement of the basis for potential ineligibility, a notice of a right to a hearing, and instructions on how to resolve the matter. *Id.* § 98.075(7)(a)1. The notice requires specific instructions on seeking restoration of rights under Article IV, section 8 and Article VI, section 4 of the Florida Constitution. *Id.* § 98.075(7)(a)1.f. The local supervisor *must* also provide a hearing, if requested, to allow the voter to provide evidence regarding eligibility, which must be reviewed before removing the voter's name from the statewide voter registration system. *Id.* § 98.075(7)(a)1–5. At the hearing, consistent with long-standing Florida practice, now codified in the Florida Statutes, the law "shall be construed in favor of the registrant." *Id.* § 98.0751(4).

Calling Florida's reasoned and measured approach Kafkaesque provides neither contrary evidence nor does it satisfy the Plaintiffs' heavy burden for relief. If cognizable, the Plaintiffs' due process concerns are speculative at best.

Thus, there is no Due Process Clause violation.

B. No harm, irreparable or otherwise.

There is no harm to the Plaintiffs—who have the burden of showing irreparable harm—for the reasons discussed above. The Plaintiffs simply ask this Court to presume harm because of alleged infringements on the right to vote. But that right is not triggered until felons are re-enfranchised. Re-enfranchisement under the statute being challenged—and the constitutional text it implements—requires completion of "all terms of sentence."

Regardless, at this time, the State of Florida is working towards improving the consolidation of credible and reliable information for use in determining voter eligibility especially when assessing eligibility based on completion of the financial obligations included in criminal sentences. App. at 130, ¶ 23. Claims of wrongful removal from the voter rolls are thus unsupported by the record, unsubstantiated by logic, and unhelpful to those charged with furthering the State's compelling interest in the integrity and credibility of the electoral process.

C. Equities and the public interest militate against injunctive relief.

The equities and the public interest also weigh decidedly in favor of denying the preliminary injunction. There is a parallel Florida Supreme Court proceeding concerning the meaning of the phrase "all terms of sentence." The Florida Supreme Court might well chart a course that avoids constitutional issues, provides guidance on severability and other issues, or even gives the Plaintiffs a reason to

drop the federal lawsuit for fear of reverting to a clemency-only process for re-enfranchisement.

Assuming the Florida Supreme Court concludes that "all terms of sentence" includes financial obligations imposed as part of the criminal sentence, this too would further the public interest. Giving meaning to the choice that millions of Floridians made on November 6, 2018 about re-enfranchisement matters. This is especially so because on the same day that millions of Floridians voted to create a second avenue for re-enfranchisement, they also voted to include a crime victim's bill of rights into the Florida Constitution. Commonly referred to as Marsy's Law, the ballot summary for the victim's rights provision stated, in relevant part, that the it would "[create] constitutional rights for victims of crime; requires courts to facilitate victims' rights; authorizes victims to enforce their rights throughout criminal and juvenile justice processes." App. at 89. The constitutional text for the victim's rights provision includes "[t]he right to full and timely restitution in every case and from each convicted offender for all losses suffered, both directly and indirectly, by the victim as a result of the criminal conduct." Art. I, § 16(b)(9).

Thus, consistent with the constitutional text approved by millions of Floridians on November 6, 2018, the public interest is furthered by ensuring that felons complete all terms of their criminal sentence before being re-enfranchised.

IV. Conclusion

Words matter. The Florida Constitution provides that felons must satisfy "all terms of sentence" before being re-enfranchised. "All" means all. The Florida Supreme Court thought so after hearing proponents of the constitutional text say so. The proponents thought so until they changed their mind. Now the Plaintiffs ask this Court to re-write the Florida Constitution under the guise of challenging the constitutionality of a state statute that implements the state constitution. They ask this Court to change "all" into "some." They ask for a constitutional re-write while the State is working towards improving the credible and reliable mechanism to assess when all financial obligations have been satisfied—when there is no harm, irreparable or otherwise. They ask for this re-write when the Florida Supreme Court is poised to provide further guidance on how best to interpret "all terms of sentence" for purposes of the constitutional provision the Plaintiffs do not challenge and the state statute the Plaintiffs do challenge. All courts—federal and state—presented a similar challenge to re-enfranchisement conditioned upon payment of legal financial obligations, incurred as a direct result of a felon's decision to commit a felony, have concluded it passes constitutional muster. Therefore, under the circumstances, dismissal of the Plaintiffs' Complaints is appropriate. Denial of the Plaintiffs' Motion for Preliminary Injunction is necessary because the Plaintiffs have failed to satisfy their heavy burden.

Respectfully submitted on September 6, 2019 by:

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

The undersigned certifies that the foregoing complies with Local Rule 7.1. Specifically, the foregoing complies with the font requirements and at 7385 words, it complies with the word limitations.

/s/ Mohammad O. Jazil
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on this 6th day of September 2019.

/s/ Mohammad O. Jazil
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