UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

KELVIN LEON JONES, *et al.*,

Plaintiffs,

v. Case No. 4:19-cv-300-RH/MJF

RON DeSANTIS, *et al.*,

Defendants.
_____/

REPLY IN SUPPORT OF
GOVERNOR AND SECRETARY OF STATE'S
OMNIBUS MOTION FOR SUMMARY JUDGMENT

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DEFENDANTS' RESPONSE TO PLAINTIFFS' COUNTERSTATEMENT OF THE MATERIAL FACTS

1. Notwithstanding the Plaintiffs' argument to the contrary, *see* ECF No. 286, at 13, Amendment 4 and Senate Bill 7066 in fact require the same thing—"*completion* of all terms of sentence." Fla. Const. Art. VI, § 4(a). The Florida Supreme Court has authoritatively interpreted "all terms of sentence" to include "all [legal financial obligations] imposed in conjunction with an adjudication of guilt," *Advisory Opinion to the Governor Re: Implementation Of Amendment 4, The Voting Restoration Amendment*, No. SC19-1341, 2020 WL 238556, at *1 (Fla. 2020); *see also* Fla. Stat. § 98.0751(2)(a). And although the Plaintiffs' contend that the Florida Supreme Court stopped short of construing the term "completion," that is immaterial; "the state of being complete" has a plain, commonsense meaning—i.e., "fully carried out." *Merriam-Webster's* Collegiate Dictionary 254 (11th ed. 2005). In most cases, "completion of all terms of sentence" (i.e., fully carrying out all legal financial obligations) for purposes of *both* Amendment 4 and Senate Bill 7066, will indeed require "payment of all outstanding financial obligations before re-enfranchising a felon." ECF No. 268, at 11.[1]

[1] Despite the Plaintiffs' representation to the contrary, Secretary Lee has *not* "conceded [that] Amendment 4 does not require payment of LFOs for 'completion' of a criminal sentence." ECF No. 286, at 2. That Senate Bill 7066 allows conversion of some legal financial obligations to community service does not represent any concession; in the event a former felon has his monetary payment converted into community service hours, he still must "repay" his debt by completing enough

2.-4. The Parties appear to agree on the substance of paragraphs 2 through 4.

5. As discussed below, the Plaintiffs have failed to offer a shred of evidence supporting their allegation that the Florida Legislature was motivated, in whole or in part, by racial discrimination when it enacted Senate Bill 7066. Neither the subjective conjecture of their own corporate representatives, evidence related to the state of affairs in 19th century Florida, nor disparate-impact evidence shed light on the motivations of the legislators who crafted Senate Bill 7066. Because the Plaintiffs offer nothing more, it remains true that the "[t]he legislative record for Senate Bill 7066 includes no evidence of discrimination." ECF No. 268, at 12.

6.-7. The number of former felons in Florida is not material to resolution of the legal issues before the Court.

7. The Plaintiffs have not demonstrated that "[a] majority of those returning citizens are unable to pay back their LFOs." ECF No. 286, at 4.

8.-9. The parties agree that certain organizations sent letters to the members of the Florida Legislature that expressed concern about the bills that were to become Senate Bill 7066 and urged them not to enact it. The Defendants maintain, however, that these letters do not, and cannot, establish that the Florida legislature acted with discriminatory intent when it enacted Senate Bill 7066.

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service at a certain dollar amount per hour to cover the amount he owes in legal financial obligations.

10. The parties agree that some money paid by felons to satisfy their fines, fees, and court costs remit to the State. Defendants maintain that this fact does not convert the legal financial obligations imposed in connection with a felony criminal sentence, all of which must be completed before re-enfranchisement may occur, into a tax for purposes of the Twenty-Fourth Amendment.

11. The Secretary of State has been working diligently to implement Senate Bill 7066 across the State. This work is intended to create processes and procedures that will balance the constitutional authority of the Supervisors with assurances that all former felons seeking re-enfranchisement can reliably know what they must do to satisfy Amendment 4's and Senate Bill 7066's requirements. The Defendants maintain that Senate Bill 7066 is being implemented in a constitutionally uniform manner across the State.

12. The knowledge of Florida officials two years before the passage of Amendment 4 and three years before enactment of Senate Bill 7066 is immaterial to the issues currently before the Court. The Secretary of State has been diligently working, and continues to work, towards implementing ongoing processes and procedures designed to ensure that former felons will have a reliable way to determine the amount they owe for purposes of re-enfranchisement under Amendment 4 and Senate Bill 7066, and the Secretary of State is working diligently on an ongoing plan to further improve the current system.

13. The Florida Legislature's actions during the most recent legislative session have no relevance to the issues before this Court.

14. The Secretary of State has taken, and continues to take, steps to execute the recommendations set out in the Voting Rights Work Group report.

ARGUMENT

I. THE PLAINTIFFS' ALLEGED INJURY CANNOT BE REDRESSED EVEN IF THE COURT STRIKES SENATE BILL 7066.

A. The Plaintiffs admit that the Florida Supreme Court has definitively construed "'all terms of sentence,'" as that phrase is used in Amendment 4, to include "not just durational periods but also all [legal financial obligations] imposed in conjunction with an adjudication of guilt." *Advisory Opinion to the Governor Re: Implementation Of Amendment 4, The Voting Restoration Amendment*, No. SC19-1341, 2020 WL 238556, at *1 (Fla. 2020). It is thus undisputed that Amendment 4 requires the same thing that Senate Bill 7066 requires—"completion" of all fines, fees, costs, and restitution imposed in the four corners of a felon's sentencing document. Because the Plaintiffs have only sued to enjoin Senate Bill 7066, the Court cannot remedy their alleged injury because their injury is independently inflicted by Amendment 4. They therefore lack Article III standing.

The Plaintiffs' response, in its substantive entirety, is severability. In their view, Amendment 4's requirement that a former felon must "complete" "*all* [legal financial obligations] imposed in conjunction with an adjudication of guilt" can be removed from the remainder of Amendment 4. *Id.* (emphasis added). It cannot.

When the Florida Supreme Court construed the phrase "'all terms of sentence'" to include all legal financial obligations, it did so based the "ordinary meaning that the voters would have understood"—specifically, that "all terms"

refers "not only to durational periods but also to all" legal financial obligations. *Id.* at *11. Thus, to excise this requirement from Amendment 4 would not involve "severing" an allegedly unconstitutional provision at all. Instead, it would involve a wholesale change in substance to a phrase that, according to the Florida Supreme Court, has an ordinary meaning that the Florida Electorate plainly understood when it cast its votes to change Florida's supreme law of the land.

The "ordinary meaning" of the phrase "all terms of sentence" was critically important to Amendment 4's passage. Specifically, Desmond Meade, the corporate representative of Florida Rights Restoration Coalition (Amendment 4's Sponsor), testified about the way in which Amendment 4 was drafted. *See* 1/14/2020 Desmond Meade Dep. Tr. at 12 (Ex. A). Mr. Meade agreed that he was "very much involved in the process of polling, focus groups," and . . . assessing potential votes for Amendment 4." *Id.* at 39. He then agreed that:

- "[M]ore favorable support for Amendment 4 is shown if the language includes the words 'completion of all sentence terms, including restitution,'" *id.* at 46;
- "'Ballot summary language that presents both sides of punishing someone when they are convicted of a crime and restoring the right to vote after they have completed their sentence was a preferred formulation for respondents in these focus groups,'" *id.*;
- "[C]ompletion of the sentence was an important factor to these focus groups," *id.*;

- "[T]he provision that requires completion of all terms, including restitution, was an important element for many of the individuals that were surveyed during this whole process," *id*. at 54;

- "'Voters are divided initially on restoration of voting rights after release from incarceration: 42 support, 40 against. But the margin increases to 47 percent support, 34 against but only after given a version that includes completion of all term—all sentence terms, probation, and parole, and including restitution, fines, community service, et cetera.'"

- "[F]rom simply [adding the terms] incarceration to all terms, increased support by 5 percent of those that were surveyed or polled," *id.* at 55.

Thus, the phrase "all terms of sentence," a phrase with an "ordinary meaning that the voters would have understood" to include "not only . . . durational periods but also . . . all [legal financial obligations," *Advisory Opinion to the Governor Re: Implementation Of Amendment 4, The Voting Restoration Amendment*, 2020 WL 238556, at *11, was deliberately selected to ensure that Amendment 4 would exceed the 60 percent "yes" vote threshold. That 64.5 percent of Florida's Electorate voted "yes" on Amendment 4 demonstrates that Amendment 4 very likely would not have passed but-for the requirement that all former felons complete their legal financial obligations before receiving their right to vote. *Fla. Dep't of State, Div. of Elections*, NOVEMBER 6, 2018 GENERAL ELECTION OFFICIAL RESULTS (CONSTITUTIONAL AMENDMENT).

Contrary to the Plaintiffs' argument, the Eleventh Circuit's preliminary-injunction opinion expressly left open the severability question. Specifically, the court pronounced that it "is the State's burden to show that Amendment 4 would not have been adopted absent the unconstitutional application of the [legal financial obligation] requirement to those who cannot pay." *Jones v. Governor of Fla*., 950 F.3d 795, 832 (11th Cir. 2020). And the Defendants had not yet carried their burden at the preliminary junction stage, that no longer remains the case. Desmond Meade's testimony and the polling data on which he relied establishes that, but-for an assurance that former felons would have to complete *all* terms of their sentence before they regained their right to vote, Amendment 4 would not have passed.

The Plaintiffs have offered nothing to rebut this evidence. Because no genuine issue of material fact exists as to Amendment 4's likelihood of passage without the "completion of all terms of sentence" limitation, summary judgment is appropriate. Accordingly, the Court should dismiss this case based on lack of Article III Standing.

B. The Defendants maintain that they are entitled to summary judgment on the NVRA claims filed by the *Raysor* Plaintiffs and on the NVRA claims filed by the *Gruver* individual Plaintiffs, with the exception of Curtis D. Bryant, Jr. A few additional points in response follow.

In arguing that the Individual Plaintiffs need not have been directly injured by the purported NVRA violations in order to meet Article III's standing requirement,

Plaintiffs cite to a footnote in 1977 case involving a re-zoning denial for the proposition that standing for one plaintiff equates to standing for all for resolution of a claim. *See Vil. Of Arlington Hgts. v. Metro. Hous. Dev. Corp.*, 429 US 252, 264 n.9 (1977). This is not an accurate statement of the law on standing or even of the footnote itself in context. In making the statement that, "[b]ecause of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit", the United States Supreme Court in *Village of Arlington Heights,* was expediently disposing of an assessment of its jurisdiction to hear the case in response to an argument that the entity denied its re-zoning request could not raise discrimination claims on behalf of prospective tenants and that no individuals themselves had standing. *Id.* at 264-65. Although uncertain that the issue had even been raised below, the Supreme Court found that with at least one individual prospective tenant having been personally impacted by the rezoning denial, it had jurisdiction to decide the case. *Id.* at 264 n.9. Thus, the court found it unnecessary to assess the standing of the other individual and entity plaintiffs. *Id.*[2] This dispensation of individual standing analysis in the interest of considering

[2] As Plaintiffs note, the 11th Circuit Court of Appeals in this case cited to the *Village of Arlington Heights* footnote. Notably, the 11th Circuit too, was merely recognizing that it need only find that one party had standing in order to find appellate review proper for the whole case. *See Jones v. Governor of Florida*, 950 F. 3d 795, 805-06 (11th Cir. 2020) ("We agree with all of the parties that regardless of whether the Governor has standing . . . the Secretary of State clearly has standing sufficient to confer jurisdiction over the entire case.").

overall appellate jurisdiction is inapplicable when analyzing individual standing of a particular claimant on a particular claim when raised in a motion for summary judgment in the district court.

An NVRA claim (as is true with any claim), regardless of relief sought, requires at its core, a particularized injury. *See Arcia v. Fla. Secretary of State*, 772 F. 3d 1335, 1340 (Fla. 11th Cir. 2014). In other words, a person must be "'adversely affected' or 'aggrieved,' and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *Id.* "For an injury to be "particularized," as required for Article III standing, "it must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (U.S. 2016).

In *Scott v. Schedler*, the case discussed in depth in the Defendants original motion, counsel conceded at oral argument that the individual plaintiff lacked Article III standing on an alleged NVRA violation related to remote registration transactions where the individual's particular transactions were in person, and as such, the individual suffered no injury related to the remote transactions. *Schedler*, 771 F. 3d 831, 835 n.8 (5th Cir. 2014). Notably, in *Schedler* this was despite the fact that the organizational plaintiff had standing. *Id.* at 837.

Thus, Defendants maintain their position that each plaintiff must establish a particularized injury, and further, that plaintiffs who registered prior to the passage

of Senate Bill 7066 have not been injured by any purported registration violations. Any allegations about having to possibly re-register in the future are hypothetical and insufficient to establish an injury based on the ascertained state of facts. *See Spokeo,* 136 S. Ct. at 1548 (not only must a plaintiff have suffered an invasion of a concrete and particularized legally protected interest, but also one that is "actual or imminent, not conjectural or hypothetical."). Further, where plaintiffs have alleged that they owe legal financial obligations and are unable to pay such obligations, they are not harmed by the Secretary's process of ascertaining whether a voter has outstanding legal financial obligations precluding eligibility. Although these Plaintiffs understandably have "a mere interest in the problem", they are not "adversely affected" or "aggrieved" by any ascertainment of the existence of such legal financial obligations as is necessary to establish a particularized injury and maintain their NVRA claims. *See Arcia,* 772 F. 3d at 1340.

Finally, Defendants continue to maintain that *Scott v. Schedler*, 771 F. 3d 831 (5th Cir. 2014) is more akin to the circumstances in this case than *Ass'n of Cmty. Orgs. For Reform Now v. Miller*, 129 F. 3d 833 (6th Circ. 1997) and ask the court to affirm under the plain language of the NVRA that a plaintiff must provide timely and individualized statutory notice in order to acquire standing for an NVRA claim.

II. SENATE BILL 7066 DOES NOT VIOLATE THE U.S. CONSTITUTION.

A. Senate Bill 7066 does not violate the Equal Protection Clause of the Fourteenth Amendment.

i. Senate Bill 7066 does not unconstitutionally discriminate on the basis of wealth.

The Defendants acknowledge the Eleventh Circuit's decision regarding the Plaintiffs' wealth-based Equal Protection claim. We note, however, that the Eleventh Circuit has not yet resolved our en banc petition. Until it does so, the Defendants maintain and preserve their arguments that (1) all Equal Protection claims (including wealth-based discrimination claims) require a showing of intentional discrimination, and the Plaintiffs have produced no evidence suggesting that Senate Bill 7066 was an act of intention wealth-based discrimination; and (2) wealth-based Equal Protection claims are subject only to rational-basis review, which Senate Bill 7066 easily survives. For those reasons, the Defendants maintain that they are entitled to judgment as a matter of law on the Plaintiffs' wealth-based discrimination claims.

ii. Senate Bill 7066 was not an act of intentional race discrimination.

When the Florida Legislature enacted Senate Bill 7066, it did so without any hint of intentional race-based discrimination. Simply put, racial discrimination did not motivate the passage of Senate Bill 7066, in whole or in part. Because there exists no genuine issue of material fact as to this question, the Defendants are entitled to summary judgment on the Plaintiffs' intentional race discrimination claim.

A. As an initial matter, Amendment 4 and Senate Bill 7066 require the same thing—"completion of all terms of sentence." Fla. Const. Art. VI, § 4(a). The Florida Supreme Court has found that "'all terms of sentence' *plainly* encompasses not only durational terms but also obligations and therefore includes all [legal financial obligations] imposed in conjunction with an adjudication of guilt." *Advisory Opinion to the Governor Re: Implementation Of Amendment 4, The Voting Restoration Amendment*, No. SC19-1341, 2020 WL 238556, at *9 (Fla. 2020) (emphasis added). Critically, the Florida Supreme Court held that the "ordinary meaning" of this phrase is one that "*the voters* would have understood to refer not only to durational periods but also to *all* [legal financial obligations] imposed in conjunction with an adjudication of guilt." *Id.* at *33 (emphases added). Indeed, several of the Organizational Plaintiffs previously thought the same, and asked the Secretary of State to confirm their understanding as to what Amendment 4 required. Thus, unless the Plaintiffs are prepared to accuse Florida's electorate of intentional race discrimination when it voted to pass Amendment 4, its intentional-discrimination challenge to Senate Bill 7066 must fail as a matter of law because the two provisions impose the same requirements.

Nevertheless, the Plaintiffs try to create space between Amendment 4 and Senate Bill 7066, arguing that the former was passed to "put an end to a racist policy that had a severely disproportionate impact on Black citizens" while the latter

"restored voting rights to no one and restricted the voting rights of citizens to the maximum extent . . . believed possible." ECF No. 286, at 17. They offer support for this purported gulf between two provisions that quite literally say the same thing, by pointing out that the Florida Supreme Court's advisory opinion "did not address when the 'terms of sentence' are considered 'complete.'" *Id.* "Complete," however, means "fully carried out," *Merriam-Webster's* Collegiate Dictionary 254 (11th ed. 2005), and although there might be different ways in which a legal financial obligation can be "fully carried out," the most common way that a financial obligation can be "fully carried out" is paying the full amount of the obligation. In other words, because the plain meaning of Amendment 4's text requires "fully carrying out" all legal financial obligations, the Amendment requires repayment of those legal financial obligations.

Properly understood, Senate Bill 7066 took the baseline requirements in Amendment 4 and made it *easier* for a former felon to "complete" his legal financial obligations for purposes of regaining the right to vote. It did so by offering ways in which legal financial obligations might be "completed" without paying them back (e.g., conversion to community service). And despite the Plaintiffs' arguments that Senate Bill 7066 could have gone further, the Florida Legislature was confined by the text of Amendment 4 (i.e., it could not completely remove the "completion" requirement without contradicting the constitutional text), and the fact remains that

the Florida Legislature offered ways in which more, as opposed to fewer, former felons could re-access the franchise. To argue, then, that Senate Bill 7066 was motivated by a desire to *disenfranchise* black former felons blinks reality.

B. The Plaintiffs' reliance on evidence from more than one-hundred yeas ago does not create a genuine dispute of fact regarding the motivations of the Florida legislators that enacted Senate Bill 7066. ECF No. 286, at 17-18. In fact, the Eleventh Circuit has foreclosed this line of argument. Despite the Plaintiffs' allegation that "[o]ne of the most pervasive forms of racism was the disenfranchisement of people convicted of felonies, which affected an estimated 21% of the Black voting-age population living in Florida," *id.* at 18, the Eleventh Circuit has held that the operative version of the Florida Constitution—which included a provision that *permanently* disenfranchised felons—was *not* motivated by intentional race discrimination. Specifically, the court found that "Florida's re-enactment of the felon disenfranchisement provision in the 1968 Constitution conclusively demonstrates that the state would enact this provision even without an impermissible motive and did enact the provision without an impermissible motive." *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1224 (11th Cir. 2005). If "Florida's felon *disenfranchisement* provision is constitutional because it was substantively altered and reenacted in 1968 in the absence of any evidence of racial bias," *id.* at 1225, it defies logic to argue here that Senate Bill 7066, which *re-enfranchises* felons in the same manner as

Amendment 4, was somehow a continuation of Florida's alleged "long and disturbing history of efforts to disenfranchise Black Floridians," ECF No. 286, No. 17-18.

C. Nothing in Senate Bill 7066's legislative record remotely suggests that any Florida legislator acted out of intentional race discrimination, in whole or in part. Senate Bill 7066, by its plain terms, applies equally to all former felons, irrespective of their race, gender, or socioeconomic class—once they complete all terms of sentence, including all legal financial obligations, they regain access to the franchise. For this reason, the Plaintiffs suggestion that "the legislature knew or should have known individuals in Florida with felony convictions are disproportionally Black" does not reduce to evidence that the Legislature acted with intentional discrimination when it enacted a generally applicable, race neutral provision, one that is identical to the requirement in Amendment 4 itself, designed to give *all* former felons, irrespective of any demographic, the right to vote once they repay their debt to society. The Plaintiffs' criticisms of the criminal justice system at large cannot establish that Senate Bill 7066 was the product of intentional race discrimination.

Nor do the efforts from certain Plaintiff organizations to bring the alleged disparate impact to the attention of the Florida Legislature. Even assuming that all Florida legislators knew that fewer black former felons would be able to satisfy their legal financial obligations, the Florida Legislature was not at liberty to ignore or alter

the plain text of Amendment 4, which conditions re-enfranchisement on "*completion* of all terms of sentence," including "all legal financial obligations." Because the Legislature had no authority to change the requirement that "all legal financial obligations" must be "completed" before a felon has his voting rights restored, it had no meaningful way to address the purported disparate impact—it could not pass a law defining "complete" as something less than "complete" without contradicting Amendment 4's language.[3] The Florida Legislature's *inability* to change the plain meaning of Amendment 4 cannot, as a matter of law or logic, establish a factual question as to whether it acted in an intentionally discriminatory way when it enacted Senate Bill 7066, even if it knew that the law would have a disproportionate impact on black former felons.

D. The Plaintiffs vastly underestimate Desmond Meade's testimony while vastly overstating the effect of their corporate representatives' testimony. Desmond Meade, who spearheaded Amendment 4, did not merely disclaim any knowledge about the motivations of Senate Bill 7066's enactors. Instead, he worked collaboratively with Florida's "elected officials to try to make this as close as possible to what we believe should have been," and once the dust had settled, he testified that Senate Bill 7066 was something "we could live with . . . and . . . were

[3] This fact also renders wholly immaterial the Plaintiffs suggestion that Rep. James Grant exhibited intentional race discrimination by committing "[w]illful avoidance." ECF No. 286, at 19.

fully prepared to operate under the color of the law and operate under the provisions that was created within 7066 to . . . allow us to actually engage Floridians from . . . all walks of life, all political persuasions, and getting them engaged in our democracy." *See* 1/14/2020 Desmond Meade Dep. Tr. at 119 (Ex. A). And, when asked whether he could identify "a single Florida legislator who you believe voted for 7066 with an intent to discriminate against racial minorities or women," he answered in the negative and added that, for some, he believe[d] the exact opposite to be true" and that there was "some genuine intent . . . to actually try to get this right." *Id.* at 119. Unless the Plaintiffs are prepared to ascribe a racially discriminatory motive to Mr. Meade, his deposition testimony strongly supports the assertion that Senate Bill 7066 was not motivated by racial discrimination.

In contrast to Mr. Meade's testimony, the Plaintiffs' corporate representatives offered nothing other than their own subjective conjecture about the motivations of the Florida Legislature and allegations of disparate impact. The former isn't evidence at all, and the latter does not, at a matter of law, equate to intentional discrimination. Finally, the Plaintiffs' bald assertion that the Legislature acted pretextually when it enacted Senate Bill 7066 should not only be dismissed out of hand as entirely unsupported but also rejected based on the fact that Senate Bill 7066 requires precisely the same thing that Amendment 4 requires—"completion of all terms of sentence," including legal financial obligations.

E. Finally, the Plaintiffs' assertion that the Legislature departed, procedurally and substantively, from the normal legislative sequence is mistaken. By all accounts, the various bills that evolved into the as-enacted version of Senate Bill 7066 percolated through both chambers of the Florida Legislature in precisely the way in which closely debated legislation always proceeds. Indeed, the only "irregularity" to which the Plaintiffs direct this Court was the Legislature's rejection of a provision that "would have allowed the conversion of LFOs to civil liens to be considered a completion of sentence that would have, in part, mitigated the severity of the limitations on the right to vote." ECF No. 286, at 21-22. Neither this purported "irregularity," nor the enactment of Senate Bill 7066 near the end of the legislative session, remotely raise even the specter of intentional race discrimination.

* * *

Although the "legislature's motivation is itself a factual question," *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999), the absence of any genuine factual dispute makes summary judgment appropriate. The Defendants have shown that Senate Bill 7066 was enacted in the normal course as a racially neutral law that defined "all terms of sentence" identically to the way in which the Florida Supreme Court defined it for purposes of Amendment 4 itself. Nothing that the Plaintiffs have offered here, or will offer at trial, can conjure an issue of fact with regard to the Legislature's

motivation in enacting Senate Bill 7066. The Defendants are therefore entitled to summary judgment on the intentional discrimination claim.

iii. Senate Bill 7066 does not violate *Bush v. Gore*'s uniformity requirement.

Finally, the Plaintiffs' suggestion that Senate Bill 7066's implementation runs afoul of *Bush v. Gore* fails as a matter of law. Although *Bush v. Gore* is indeed a precedential opinion of the United States Supreme Court, it controls only insofar as it establishes a rule that applies to the circumstance of this case. And the rule announced in *Bush v. Gore*—that "a recount process" without uniform standards "is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the *special instance* of a statewide recount under the authority of a single state judicial officer," 531 U.S. 98, 109 (2000) (emphasis added)—has nothing to do with the way in which Senate Bill 7066 is implemented. Indeed, the *Bush v. Gore* majority expressly limited its "consideration . . . to the present circumstances" in that case, and it made clear that the "question before [it was] not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* In so holding, the *Bush v. Gore* majority sought to ensure that litigants would not expand its uniformity rule beyond the unique confines of that opinion. Accordingly, the Eleventh Circuit, like other

courts,[4] has given its imprimatur to "local variety," which "can be justified by concerns about cost, the potential value of innovation, and so on." *Wexler v. Anderson*, 452 F.3d 1226, 1233 (11th Cir. 2006) (citing *Bush v. Gore*, 531 U.S. at 134)).

But even assuming that *Bush v. Gore*'s uniformity requirement applies to Senate Bill 7066's implementation (and the Defendants maintain that it does not), the State has exceeded "the rudimentary requirements of equal treatment and fundamental fairness." *Id.* "[S]pecific rules designed to ensure uniform treatment" are all that is required, *id*. at 106, and these specific rules are codified in Amendment 4, Senate Bill 7066, and the work that has been, and continues to be done, by the Secretary of State. Amendment 4 and Senate Bill 7066 uniformly require that any former felon wishing to access the franchise must complete all terms of sentence, including all legal financial obligations included in the four corners of a sentencing document. Senate Bill 7066 provides a uniform list of sources that the Secretary of State may use to determine "those registered voters who have been convicted of a felony and whose voting rights have not been restored," including, "but not limited

[4] *See also Lemons v. Bradbury*, 538 F.3d 1098, 1106 (9th Cir. 2008) ("[I]solated discrepancies do not demonstrate the absence of a uniform standard."); *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) ("[D]emocratic federalism . . . permits states to serve as laboratories . . . [b]y phasing in a new election system gradually . . . . (quotations omitted)); *Barber v. Bennett*, Case No. 4:14-cv-02489, 2014 WL 6694451, at *5 (D. Ariz. Nov. 27, 2014) (*Bush v. Gore* does not require uniformity from county-to-county).

to, a clerk of the circuit court, the Board of Executive Clemency, the Department of Corrections, the Department of Law Enforcement, or a United States Attorney's Office." Fla. Stat. § 98.075(5). And the work that has been done, and continues to be done, by the Secretary of State is why this case is analogous to *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008), which rejected a *Bush v. Gore* claim because, there, the Secretary of State "uniformly instruct[ed] county elections officials" how to implement the law at issue in that case. *Id.* at 1106.

For all these reasons, Senate Bill 7066 is not subjecting any former felon to "arbitrary and disparate treatment" that "value[s] one person's vote over that of another." *Bush v. Gore*, 531 U.S. at 104-05. Each former felon is treated equally—once they satisfy the conditions of their respective sentences, they may vote. For this reason, Senate Bill 7066 does not violate *Bush v. Gore* and the Defendants are entitled to judgment as a matter of law on this claim.

B. Senate Bill 7066 does not violate the Twenty-Fourth Amendment.

i. The Twenty-Fourth Amendment does not apply until the Plaintiffs' voting rights are restored.

The underlying premise in the Plaintiffs' poll-tax argument is wrong. Senate Bill 7066 *imposes* no financial obligation on any former felon's right to vote. Instead, it requires what Amendment 4 requires—satisfaction of pre-existing legal financial obligations imposed as part of a criminal sentence. The existence of these legal financial obligations has nothing to do with the right to vote; indeed, for each

individual Plaintiff, these legal financial obligations were imposed long before either Amendment 4 or Senate Bill 7066 existed, and they would be owed irrespective of any former felon's desire to regain access to the franchise. Once these preexisting legal financial obligations are satisfied by the former felon, the former felon regains his right to vote.

Because no former felon in Florida has the right to vote before he satisfies his legal financial obligations (or is granted clemency), they have no cognizable Twenty-Fourth Amendment claim. Every court to consider this question—three separate Circuits and two separate districts—is in accord.[5] The Court should join them by deciding this question accordingly and granting summary judgment in favor of the Defendants on this claim.

ii. Fines, restitution, fees, and costs imposed in a felony criminal sentence are not taxes.

Assuming that the Twenty-Fourth Amendment applies to the Plaintiffs (and until they regain their voting rights, it does not), none of the legal financial obligations at issue constitute a tax for purposes of the Twenty-Fourth Amendment. Although the Plaintiffs note that "courts use a functional approach to determine what

[5] *See Johnson v. Bredesen*, 624 F.3d 742, 750 (6th Cir. 2010); *Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010) (O'Connor, J.); *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000); *Thompson v. Alabama*, 293 F. Supp. 3d 1313, 1332-33 (M.D. Ala. 2017); *Coronado v. Napolitano*, No. 07-1089, 2008 WL 191987 (D. Ariz. Jan. 22, 2008).

constitutes a tax," ECF No. 286, at 29, they advocate for a bright-line, inflexible, unsupportable rule. In their view, *any time* money goes from individual to government, a tax has been imposed.

This purported rule finds no support in any precedent. Nor does their suggestion that a punitive measure enacted by a State can be considered a tax even though an identical punitive measure enacted by the federal government *cannot* be considered a tax. Indeed, the sole, one-hundred-year-old case the Plaintiffs offer in support suggests precisely the opposite. *See Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922). Nor does their purported rule make any sense; both States and Congress have prerogative to establish punitive laws, and the Plaintiffs offer no explanation whatsoever why the way in which a tax is defined would change based on the source of the sovereign's ability to impose criminal liability (whether it be a State's inherent police powers or Congress's Article I power to regulate commerce).

Bailey, the sole precedent offered by the Plaintiffs, stands for the proposition that "the penalizing features of [a] so-called tax" can cause it to "lose[] its character as such and become[] a mere penalty with the characteristics of regulation and punishment." *Id.* at 38. In other words, if a law's "prohibitory and regulatory effect and purpose are palpable," it is not a tax, even if it has the effect of contributing to the State's coffers. For this reason, the Court was right to reject the Plaintiffs'

argument that criminal fines and restitution are not taxes for purposes of the Twenty-Fourth Amendment, and it need not revisit that determination now.

The same rationale demonstrates why court costs and fees, for purposes of Amendment 4 and Senate Bill 7066, cannot constitute "taxes" for purposes of the Twenty-Fourth Amendment. Not all court costs and fees will prevent a former felon from accessing the franchise. To the contrary, only those court costs and fees that make up part of a criminal sentence—i.e., those that are part of a punitive sanction—need be completed before a former felon regains his right to vote. The Florida Supreme Court reiterated this when it held that "all terms of sentence" includes "all [legal financial obligations] imposed in *conjunction with an adjudication of guilt*," *Advisory Opinion to the Governor Re: Implementation Of Amendment 4, The Voting Restoration Amendment*, No. SC19-1341, 2020 WL 238556, at *1 (Fla. 2020) (emphasis added). And Senate Bill 7066 includes this same limitation by clarifying that "'[c]ompletion of all terms of sentence'" refers only to the obligations "contained in the four corners of the sentencing document." Fla. Stat. § 98.0751(2)(a).

In other words, although *some* costs and fees are imposed regardless of adjudication, only those costs and fees that constitute part of a felony sentence will bar a former felon from the ballot box, so long as they remain incomplete. For this reason, *disqualifying* costs and fees, for purposes of Amendment 4 and Senate Bill

7066, are part of the debt to society that a former felon must pay before he regains the right to vote. For this reason, they serve largely the same "regulation and punishment" ends as do fines and restitution. *Bailey*, 259 U.S. at 38. That the proceeds of fines, fees, and costs make their way to the State does not turn legal financial obligations designed to serve the punitive, retributive, and rehabilitative ends of the criminal justice system into taxes for purposes of the Twenty-Fourth Amendment. For these reasons, should the Court decide that the Twenty-Fourth Amendment applies to former felons who have not yet regained the right to vote, the Defendants are nonetheless entitled to summary judgment on the Plaintiffs' Twenty-Fourth Amendment claims.

C. Senate Bill 7066 does not violate the Due Process Clause of the Fourteenth Amendment.

i. Senate Bill 7066 provides felons with all the process they are due under the Fourteenth Amendment.

Reduced to its core, the Plaintiffs' Procedural Due Process argument turns on their dissatisfaction with the work that the Secretary of State has conducted (and continues to conduct) to ensure that the Department of State, County Supervisors of Elections, and former felons all know who is and is not eligible to vote, and, for those who aren't yet eligible to vote, what precisely must be done to gain eligibility under Amendment 4 and Senate Bill 7066. But as counsel stated during the March 17, 2020 telephonic status conference, the Secretary of State has a plan to implement

Senate Bill 7066 in the event that (1) the en banc Eleventh Circuit revisits the conclusion the Court reached with regard to the Plaintiffs' wealth-based discrimination claim; (2) the en banc Eleventh Circuit leaves that ruling intact; (3) the Defendants prevail on the remainder of the Plaintiffs case, either after the bench trial or at the summary-judgment stage; or (4) the Plaintiffs prevail.

Given the variety of ways in which this case might be resolved, the Secretary of State is not currently sending information relating to former felons' legal financial obligations to the Supervisors of Elections. It stands ready, however, to implement Senate Bill 7066 in accordance with the legal conclusions resulting from this case, as soon as those legal conclusions finalize. In any event, the twenty-one individual former felons involved in this litigation (and covered by the Court's preliminary injunction) have been given their access to the franchise. For these reasons, the Plaintiffs have received all the process they are due under the Fourteenth Amendment, and their Procedural Due Process Claims fail as a matter of law.

ii. Senate Bill 7066 is not unconstitutionally vague.

As noted throughout this brief, the Secretary of State has will soon implement procedures designed to ensure clarity regarding which former felons are eligible to vote under Amendment 4 and Senate Bill 7066, and what those who aren't yet eligible must do to regain their access to the franchise. For this reason, the Court's

conclusion that Senate Bill 7066 is not unconstitutionally vague remains correct, and it should grant the Defendants' summary judgment as to this claim.

iii. Senate Bill 7066 does not violate any notions of fundamental fairness.

Because the Plaintiffs appear to agree that their fundamental fairness claim will rise and fall with their wealth-based discrimination claim, the Defendants maintain that they are entitled to judgment as a matter of law for the reasons discussed above. *See supra* at 15.

D. Senate Bill 7066 does not violate the Nineteenth Amendment.

In an apparent attempt to resuscitate their meritless Nineteenth Amendment claim, the Plaintiffs now claim that their Nineteenth Amendment claim is actually "grounded *both* in the Fourteenth Amendment's equal protection clause and in the Nineteenth Amendment's prohibition against any law that denies or abridges their right to vote based on gender or sex." ECF No. 286, at 52. In their view, "[t]he proper test the Court should apply to their equal protection claim is the undue burden standard articulated in *Anderson-Burdick*" and "*Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992)." ECF No. 286, at 52, 57. According to the Plaintiffs, this obviates the need to prove intentional gender discrimination to sustain their claim.

Rather than resorting to the view of one scholar who asserts that "the Nineteenth Amendment necessarily must be read in the context of the evolving,

expansive protection of voting rights and women's rights under the Fourteenth Amendment" (which, in the Plaintiffs' view, somehow means that a showing of intentional discrimination is not required), the Court should apply binding U.S. Supreme Court precedent, which holds that the Nineteenth Amendment and the Fifteenth Amendment should be interpreted identically. *See Mobile v. Bolden*, 446 U.S. 55, 128 (1980), *superseded by statute on other grounds*. And because "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation," *id*.; *accord Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1356 (4th Cir. 1989), gender-based discriminatory motivation is a necessary ingredient of a Nineteenth Amendment violation.

The Plaintiffs have failed to offer any evidence suggesting that the Florida Legislature intended to discriminate against low-income women of color when it enacted Senate Bill 7066. Instead, the evidence they offer establishes that the criminal justice system as a whole imposes uniquely difficult challenges on low-income women of color as they reenter society after a felony conviction. These criticisms, however valid, do not call into question the constitutionality of Senate Bill 7066, which applies equally to all former felons regardless of race, sex, or socioeconomic status. Suggesting an alleged disparate impact (which the Defendants do not concede), does not, as a matter of law, give rise to a cognizable Nineteenth

Amendment claim. For that reason, the Court should grant the Defendants' summary judgment.

E. Senate Bill 7066 does not burden their right to vote and, accordingly, does not fail the *Anderson-Burdick* balancing test.

The Defendants maintain their argument that, because no former felon can claim the right to vote until he satisfies the requirements of Amendment 4 and Senate Bill 7066, the *Anderson-Burdick* test is categorically inapplicable. *See* ECF No. 268, at 45-46.

But assuming *Anderson-Burdick* does apply, the Defendants are still entitled to judgment as a matter of law. Plaintiffs' *Anderson-Burdick* argument is premised entirely on the alleged "failure of the State to provide a process for showing inability to pay or determining eligibility, along with the State's failure to provide reliable information to voters necessary to determine eligibility without voters risking criminal prosecution." ECF No. 286, at 49-50. As discussed above, the Secretary will soon implement procedures that will ensure reliable identification of those former felons who are already eligible to vote, those who are not, and what those who are not have to do in order to regain access to the franchise. For this reason, the Plaintiffs' *Anderson-Burdick* argument fails for the same reason their Procedural Due Process Argument fails.

F. Senate Bill 7066 does not violate the First Amendment.

As an initial matter, it appears that the Plaintiffs' largely agree that their First Amendment claim does not, as a matter of Circuit precedent, provide the Individual Plaintiffs with any argument beyond those they have advanced through their Equal Protection claims. Thus, the Defendants are entitled to judgment as a matter of law for the reasons discussed above. *See supra* at 15-25.

That the Plaintiffs view the Defendants' position as "ludicrous" cleanly underscores the fundamental misconception infecting each one of their challenges to Senate Bill 7066. The Plaintiffs are wrong in their belief that "[i]t is solely due to the draconian language and effect of [Senate Bill] 7066 that these returning citizens will be unable to vote and the organizational Plaintiffs' ability to identify, recruit, and register voters will be impeded." ECF No. 286, at 59. Without Amendment 4, *no* former felon, save for those who had been granted clemency, would have the right to vote at all. Amendment 4 *restores* the right to vote to former felons, but only *after* they have "completed all terms of sentence," including all legal financial obligations. Senate Bill 7066 does precisely the same thing by merely reiterating what "terms of sentence" means for purposes of Amendment 4 and by offering ways in which former felons can "complete" their "terms of sentence" *other than* repaying their legal financial obligations in full (e.g., conversion to community service).

Simply put, the combination of Amendment 4 and Senate Bill 7066 *increase* access to the franchise in ways that never existed before. This alone dooms any argument that the Organizational Plaintiffs' First Amendment rights have been infringed; Amendment 4 and Senate Bill 7066 *augment* their right to politically organize and associate. And to the extent the Plaintiffs argue that the current processes violate the First Amendment because they make the work of identifying which former felons may vote and the ways in which other former felons can regain their right to vote, their argument fails alongside of their Procedural Due Process arguments.

G. Because Senate Bill 7066 inflicts no punishment, it does not violate either the *Ex Post Facto* Clause or the Eighth Amendment.

It takes no factual development to reach the determination that neither Amendment 4 nor Senate Bill 7066 inflicts any punishment. Amendment 4 and Senate Bill 7066 take an existing punishment (disenfranchisement) and codify the way in which that existing punishment can be removed—i.e., satisfaction of certain pre-existing criminal sanctions, including all legal financial obligations imposed as part of a criminal sentence. It defies all notions of logic to argue otherwise.

The Eleventh Circuit's preliminary-injunction opinion does not make this argument any less irrational. The Court did no more than observe that "[d]isenfranchisement is punishment," *Jones v. Governor of Fla.*, 950 F.3d 795, 815 (11th Cir. 2020). Disenfranchisement, however, is caused neither by Amendment 4

nor by Senate Bill 7066. It is *removed* by Amendment 4 and Senate Bill 7066, once the requirements in Amendment 4 and Senate Bill 7066 are satisfied.

Nor does the State's position on appeal contradict the position it takes here. The State does indeed have an interest in seeing that felons satisfy their full measure of debt to society, which includes completion of all terms of their respective sentences (including satisfaction of their legal financial obligations). The State's interest in maintaining one form of punishment (i.e., disenfranchisement) until all others are completed (e.g., prison time, state supervision, fines, fees, costs, and restitution[6]) does not translate into an argument that Senate Bill 7066's re-enfranchisement processes inflicts punishment of its own. And because it does not, Senate Bill 7066 cannot, as a matter of law, violate either the Eighth Amendment or the *Ex Post Facto* Clause.

Finally. the Plaintiffs are wrong to suggest that the Defendants have misunderstood their Eighth Amendment claim. It fails irrespective of whether it they conceptualized it as a Cruel and Unusual Punishment Clause violation or an Excessive Fines Clause violation for precisely the same reason—Senate Bill 7066

[6] The punishment discussed during the legislative session leading to the passage of Senate Bill 7066 was in reference to the fines, fees, and restitution imposed as part of a criminal sentence—punitive legal financial obligations that would exist irrespective of Senate Bill 7066. They cannot, as a matter of law, support the Plaintiffs' argument that Senate Bill 7066 inflicts punishment in contravention of the Eighth Amendment or the *Ex Post Facto* Clause.

inflicts no punishment of any sort, fines or otherwise. The punitive terms of sentence that must be completed before Amendment 4 and Senate Bill 7066 restore a former felon's right to vote exist by virtue of the felonies that these individuals committed. For this reason, the Plaintiffs' Eighth Amendment and *Ex Post Facto* Claims fail as a matter of law.

III. THE *MENDEZ* AND *JONES* COMPLAINTS SHOULD BE DISMISSED IN THEIR ENTIRETY.

In their Motion for Summary Judgment, the Defendants argued that, because the *Jones* and *Mendez* Complaints seek writs of mandamus, they are subject to dismissal in their entirety. This is because "a federal court lacks the general power to issue writs of mandamus to direct state officers in the performance of their duties when mandamus is the only relief sought." *Fox v. Detzner*, No. 4:18-cv- 529 (N.D. Fla. Nov. 16, 2018) (citing *Moye v. Clerk, DeKalb Cty. Sup. Ct*., 474 F.2d 1275, 1276 (5th Cir. 1973)).[7]

Neither the *Jones* nor *Mendez* Plaintiffs filed any opposition to the Defendants' motion for summary judgment. And since the Defendants moved for judgment as a matter of law, the *Jones* and *Mendez* Plaintiffs have indicated their desire to voluntarily dismiss their claims that Senate Bill 7066 violates Article 4, Section 4 of the Florida Constitution or Section 2 of the Voting Rights Act. *See* ECF

[7] This case remains binding in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

No. 286, at 1 n.4. Given their failure to respond whatsoever to the Defendants arguments (save for acquiescing in several of them), the Defendants respectfully request judgment as a matter of law on the *Jones* and *Mendez* claims in their entirety.

CONCLUSION

For the foregoing reasons, the Defendants are entitled to judgment as a matter of law.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

The undersigned certifies that the foregoing complies with the size, font, and formatting requirements of Local Rule 5.1(C), and that the foregoing complies with the word limit requested in the Defendants' pending motion to file a Reply Brief in excess of the word limit. Specifically, this memorandum contains 8,186 words, excluding the case style, signature block, and certificates.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record via email on this 17th day of March, 2020.

/s/ Edward M. Wenger
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