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.
_____/

**THE GOVERNOR & SECRETARY OF STATE'S TRIAL BRIEF**

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## STANDING

### A. Legal Criteria

"Article III of the United States Constitution limits the 'judicial Power'—and thus the jurisdiction of the federal courts—to 'Cases' and 'Controversies.'" *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019) (quoting U.S. Const. art. III, § 2)). "The 'standing' doctrine is 'an essential and unchanging part of the case-or-controversy requirement.'" *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "In order to establish her standing to sue, a plaintiff must satisfy three (by now familiar) criteria":

- "First, the plaintiff must demonstrate that she has suffered an 'injury in fact'—an invasion of a legally protected interest that is both (a) 'concrete and particularized' and (b) 'actual or imminent, not conjectural or hypothetical'";
- "Second, the plaintiff must show a 'causal connection' between her injury and the challenged action of the defendant—*i.e.*, the injury must be 'fairly . . . trace[able]' to the defendant's conduct, as opposed to the action of an absent third party";
- "Finally, the plaintiff must show that it is likely, not merely speculative, that a favorable judgment will redress her injury."

*Id.* (internal citations omitted). These elements "are not mere pleading requirements but rather an indispensable part of [a] plaintiff's case." *Ga. Republican Party v. SEC*, 888 F.3d 1198, 1201 (11th Cir. 2018) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). For this reason, the Plaintiffs "'bear[] the burden of establishing' standing." *Id.* (quoting *Lujan*, 504 U.S. at 561).

### B. The State Defendants' Argument

**1.** Each group of Plaintiffs has challenged the provisions in Senate Bill 7066 that define "[c]ompletion of all terms of sentence" as including "[f]ull payment of restitution ordered to a victim by the court as a part of the sentence" and [f]ull payment of fines or fees ordered by the court as a part of the sentence or that are ordered by the court as a condition of any form of supervision, including, but not limited to, probation, community control, or parole." Fla. Stat. § 98.0751(2)(A)5. No group of Plaintiffs has challenged, in whole or in part, Amendment 4 itself, which provides that "any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation." Fla. Const. Art. VI, § 4(a).

On January 16. 2020, the Florida Supreme Court unanimously agreed that the phrase "all terms of sentence" for purposes of Amendment 4 includes "'all'—not some—[legal financial obligations] imposed in conjunction with an adjudication of guilt." *In re Advisory Op. to the Governor Re: Implementation Of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070, 1075 (Fla. 2020). Six of the seven Justices reached this conclusion because the phrase "all terms of sentence," has an "ordinary meaning that the voters would have understood" to include "not only . . . durational periods but also . . . all [legal financial obligations." *Id.* at 1084. The seventh reached the same conclusion because of the extrinsic evidence

surrounding Amendment 4's passage, such as: "responses by counsel for the sponsor of Amendment 4, Floridians for a Fair Democracy, to questions posed by Justices Polston and Lawson during oral argument in 2017," which "[a]rguably, . . . provide the most helpful revelations concerning what 'completion of all terms of sentence' encompassed." *Id.* at 1086 (Labarga, J., concurring). Specifically, when "Justice Polston pointedly asked whether 'completion of [all] terms' included 'full payment of any fines,' . . . counsel for the sponsor responded: 'Yes, sir . . . all terms mean all terms within the four corners.'" *Id.* And when "Justice Lawson similarly asked, 'You 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 is ordered to the victim as part of a sentence?' Counsel answered, 'Yes.'" *Id.*

In other words, Senate Bill 7066 and Amendment 4 require the same thing: completion of "'all'—not some—[legal financial obligations] imposed in conjunction with an adjudication of guilt." *Id.* at 1075. Because all the Plaintiffs have challenged the legal-financial-obligation requirement in Senate Bill 7066 but no Plaintiff has challenged the legal-financial-obligation requirement in Amendment 4, striking the legal-financial-obligation requirement in Senate Bill 7066 would not remedy the Plaintiffs' injury. Because "granting" the Plaintiffs "the relief [they] seek[] against" Senate Bill 7066 "will do nothing" to alter the identical legal-financial-obligation requirement in Amendment 4 itself, "the relief [they] seek[] in

this lawsuit would not redress [their purported] injury." *Fla. Family Policy Council v. Freeman*, 561 F.3d 1246, 1257–58 (11th Cir. 2009). For that reason, the court should "dismiss the case for lack of subject matter jurisdiction." *Id.* at 1258.

**2.** The Plaintiffs' sole response is that the legal-financial-obligation requirement in Amendment 4 can be severed. But it cannot. The Eleventh Circuit has held that "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). At trial State Defendants will show that the plain text of Amendment 4 itself can only be understood to encompass all terms—including outstanding legal financial obligations, regardless of ability to pay. This conclusion is further buttressed by the contemporaneous understanding of some of the Plaintiffs now before the Court, the materials provided by counsel for some of the Plaintiffs to Florida voters, and the materials of Amendment 4's sponsor.

## THE CAUSES OF ACTION

### I. EQUAL PROTECTION CLAIM: WEALTH-BASED DISCRIMINATION[1]

#### A. Legal Criteria/Elements of the Cause of Action

When adjudicating the Defendants' appeal from the Court's preliminary injunction, the Eleventh Circuit noted that "[t]he Constitution guarantees that '[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws,'" *Jones*, 950 F.3d at 807-08 (quoting U.S. Const. amend. XIV), which means that "[w]henever the law classifies and treats people differently," the Court must "ask whether the equal protection of the law has been violated," *Id.* According to the Eleventh Circuit, "heightened scrutiny applies in this case because we are faced with a narrow exception to traditional rational basis review,"[2] *i.e.*, "the creation of a

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[1] The Plaintiffs appear to agree that their fundamental fairness claim rises and falls alongside their wealth-based discrimination claim:

> The Eleventh Circuit's decision also disposes of Defendants' argument, in the context of fundamental fairness, that Senate Bill 7066 "does not 'punish[]' felons 'for nonpayment' of their legal financial obligations." (Mot. at 43.) The Eleventh Circuit held that the "LFO requirement punishes those who cannot pay more harshly than those who can."

ECF No. 286, at 25 n.15.

[2] The State Defendants maintain and preserve for appeal their arguments that (1) wealth-based discrimination claims require a showing of intentional discrimination (which the Plaintiffs have neither pleaded nor established) and (2) because the Plaintiffs can claim neither a fundamental right nor suspect-class status, their wealth-discrimination claims are subject to rational-basis review. The Eleventh Circuit's opinion in the appeal from this Court's preliminary injunction has a limited binding effect; the narrow holding there was affirmance of the injunction, not the ultimate resolution of the equal protection claims.

wealth classification that punishes those genuinely unable to pay fees, fines, and restitution more harshly than those able to pay—that is, it punishes more harshly solely on account of wealth—by withholding access to the ballot box." *Id.*

The Eleventh Circuit explained that the heightened scrutiny inquiry for purposes of wealth discrimination is "comprised of four considerations":

- "'the nature of the individual interest affected'";
- "'the extent to which it is affected'";
- "'the rationality of the connection between legislative means and purpose'"; and
- "'the existence of alternative means for effectuating the purpose.'"

*Id.* (quoting *Bearden v. Ga.*, 461 U.S. 660, 666-67 (1983)).

**B. The State Defendants' Case**

Applying the four heightened-scrutiny considerations articulated by the Eleventh Circuit's preliminary injunction opinion, the Court should not strike Senate Bill 7066's legal-financial-obligation requirement as an act of unconstitutional wealth-based discrimination.

**1.** *"[T]he nature of the individual interest affected"*: The individual right to vote, standing alone, is not the interest that is affected by Senate Bill 7066. Instead, the precise interest at issue is the right to vote-restoration for those who have lost the right to vote due to a felony conviction. The right to vote is fundamental, but it can be forfeited. *Richardson v. Ramirez*, 418 U.S. 24 (1974). All courts to have

addressed the issue have determined that that, "[h]aving lost their voting rights, [the] Plaintiffs lack any fundamental interest to assert." *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010); *see also Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983) ("[T]he right of felons to vote is not 'fundamental.'").

**2.** *"'[T]he extent to which [the interest] is affected'"*: The interest at issue—vote-restoration—is enhanced by Senate Bill 7066 to the same extent that it is enhanced by Amendment 4. Before Amendment 4's passage, former felons could not regain the right to vote outside of the clemency process. After Amendment 4's passage, former felons may now rejoin the franchise, but only after they "complete[] all terms of sentencing, including "not only . . . durational periods but also . . . all [legal financial obligations]." *In re Advisory Op. to the Governor Re: Implementation Of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d at 1084. As discussed above, Senate Bill 7066 requires no more than Amendment 4 requires.

**3.** *"'[T]he rationality of the connection between legislative means and purpose'"*: At trial, the State Defendants will show that the framers of Amendment 4 chose to craft a proposed constitutional amendment that, if passed, would restore felon voting rights, but only *after* a former felon fully satisfied his or her entire debt to society. Senate Bill 7066 rationally implements the intent of Amendment 4's framers by explaining that a former felon may rejoin the franchise after he or she

completes all the terms that are "included in the four corners of the sentencing document," Fla. Stat. § 98.0751(2)(a), including the legal financial obligations that Amendment 4 itself requires, see In re Advisory Op. to the Governor Re: Implementation Of Amendment 4, The Voting Restoration Amendment, 288 So. 3d at 1084.

**4.** *"'[T]he existence of alternative means for effectuating the purpose'"*: Because Amendment 4 itself requires completion of "'all'—not some—[legal financial obligations] imposed in conjunction with an adjudication of guilt," *id.* at 1075, Senate Bill 7066 could not have been written in any way that would *not* require completion of all the terms that are "included in the four corners of the sentencing document," Fla. Stat. § 98.0751(2)(a) Any alternative means would violate the plain text of Amendment 4.

## II. EQUAL PROTECTION CLAIM: RACE-BASED DISCRIMINATION

### A. Legal Criteria/Elements of the Cause of Action

The Equal Protection Clause forbids a state from "denying to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Because Senate Bill 7066 is a facially neutral law, the Plaintiffs must demonstrate the it was promulgated "to intentionally discriminate on the basis of race." *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1218 (11th Cir. 2005) (citing *Washington v. Davis*, 426 U.S. 229, 239–40 (1976)). Specifically, to succeed on their intentional-discrimination claim, the Plaintiffs must show that Florida's "method for reenfranchising . . . convicted felon[s] . . . had both the purpose and effect of invidious discrimination." *Hand v. Scott*, 888 F.3d 1206, 1209 (11th Cir. 2018) (citing *Hunter v. Underwood*, 471 U.S. 222, 227–28 (1985)).

"A discriminatory purpose exists if 'racial discrimination was a substantial or motivating factor behind enactment of the law.'" *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 1006 (11th Cir. 2018) (quoting *I.L. v. Alabama*, 739 F.3d 1273, 1277–78 (11th Cir. 2014)). And "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). This evidence may include:

- The "racial 'impact of the official action'";
- "the 'historical background of the decision'";
- "the 'specific sequence of events leading up to the challenged decision'";
- any "procedural or substantive 'departures from the normal' sequence"; and
- "'legislative or administrative history.'"

*Id.* (quoting *Vill. of Arlington Heights*, 429 U.S. at 266-68).

**B. The State Defendants' Case**

Applying the *Arlington Heights* factors, the State Defendants maintain that racial discrimination did not motivate Senate Bill 7066's passage.

**1.** *"[The] racial 'impact of the official action'"*: Senate Bill 7066 is facially neutral legislation that mirrors the Florida Supreme Court's opinion as to the meaning of Amendment 4. *See Advisory Op. to Governor re: in re Advisory Op. to the Governor Re: Implementation Of Amendment 4, The Voting Restoration Amendment*, 288 So. 3d 1070. Regardless of race, felons are obligated to complete all terms of their sentences prior to receiving the restoration of their voting rights. Senate Bill 7066 requires the completion of all terms of sentence because that is the language mandated by Amendment 4.

The Plaintiffs' arguments about disparate impact are instead collateral attacks on the criminal justice system and are not the result of Senate Bill 7066. Moreover, the Supreme Court has made clear that "impact alone is not determinative," and this

is not one of those "rare" cases where a "clear pattern" emerges where the governing legislative is "unexplainable on grounds other than race." *Weatherford v. Bursey*, 429 U.S. 545, 564 (1977). Instead, Senate Bill 7066 dutifully provides legislative guidance as to the requirements of Amendment 4, a constitutional initiative brought by Florida citizens.

**2.** *"'[The] historical background of the decision'"*: The historical background of the passage and implementation of Senate Bill 7066 favors the State Defendants. The Plaintiffs have no evidence that the current Florida Legislature had a history of acting with racial animus. The Plaintiffs erroneously point to a number of bills that were introduced into different Legislatures with different membership and without admitting that, as written, those proposals were vastly different than Amendment 4 and would never have been approved by Florida voters (*e.g.*, many would have allowed murderers to vote or would have allowed felons to run for office from prison).

Moreover, the State Defendants will show that, following the 1968 constitution, Florida's constitutional revision commissions did not act with racial animus—notably the evidence shows that the 2017–2018 constitutional revision commission was considering a proposal with the exact language of Amendment 4 (to ensure it would be on the 2018 ballot) and placed Marsy's Law on the ballot.

**3. "***[T]he 'specific sequence of events leading up to the challenged decision'"*: Senate Bill 7066 was enacted as a result of the passage of Amendment 4. The State Defendants will show that the ballot sponsor and other supporting organizations behind Amendment 4 purposely chose the language of the constitutional amendment in an attempt garner the necessary 60 percent of the electorate vote for passage. The ballot sponsor's attorney informed the Florida Supreme Court that Amendment 4 would require former felons to repay any restitution, fines, fees, and costs as ordered by a judge. Moreover, the ballot sponsor and these supporting organizations actively informed voters as to this requirement. The same voters who passed Amendment 4 also passed Amendment 6, known as "Marsy's Law," which provides crime victims with the "right to full and timely restitution in every case." Fla. Const. Art. I, § 16. The Florida Legislature enacted Senate Bill 7066 to mirror what Amendment 4's ballot sponsor told the Florida Supreme Court and Florida voters about the meaning of the amendment.

**4.** *"[P]rocedural or substantive 'departures from the normal' sequence"*: The Plaintiffs cannot point to any procedural or substantive departures from the normal sequence. The Legislature held approximately one dozen workshops, committee meetings, and floor debates and spent hours asking for and listening to testimony from the public. Members of the Florida Legislature, including the bill sponsors in the House and Senate, met with the ballot sponsor for Amendment 4 and

other citizens numerous times throughout the course of the legislative session. Moreover, the Plaintiffs cannot cite any "factors usually considered important by the decisionmaker [that] strongly favor a decision to contrary to the one reached." *Weatherford*, 429 U.S. at 564–65.

**5.** *"'[L]egislative or administrative history"*: The State Defendants will show that after Amendment 4 was passed and before the 2019 legislative session began, some of the Plaintiffs and their attorneys urged the Secretary and Legislature to implement Amendment 4 consistently with the intent of the ballot sponsor and Florida voters—*i.e.*, to require the payment of all restitution, fines, fees, and costs as ordered by a judge prior to the restoration of a former felon's voting rights.

During early committee weeks and the legislative session, the Florida Legislature held workshops on the requirements of Amendment 4, held numerous committee meetings, spent hours listening to testimony from Florida citizens and groups that supported Amendment 4, and debated the merits of various proposals. As the legislative process continued, the evidence will show it is the Plaintiffs and their attorneys who changed their tune about what Amendment 4 means and requires—not the Florida Legislature and not the ballot sponsor—and ultimately, these groups began trying to manufacture *Arlington Heights* factors in the legislative record to which they could point in a future lawsuit against the state.

The Plaintiffs have no evidence of racial animus by the Legislature, and to the contrary, a number of Democratic legislators who opposed Senate Bill 7066 even stated that they did not believe their colleagues who supported the bill had any malicious intent. In fact, Desmond Meade, the architect of Amendment 4, testified under oath that his organization, Florida Rights Restoration Coalition, *supported* the final version of Senate Bill 7066 and that he believed the House and Senate sponsors of the legislation had a "genuine intent" to "try to get this right."

## III. EQUAL PROTECTION CLAIM: UNIFORMITY REQUIREMENT

### A. Legal Criteria/Elements of the Cause of Action

The United States Supreme Court has held that "[e]qual protection applies" not only to the "initial allocation of the franchise" but also "to the manner of its exercise." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).[3] In other words, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.*

"The question," however, is "not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* Rather, the inquiry is whether there exist "minimal procedural safeguards" providing "some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Id.* For this reason, the Eleventh Circuit, like other courts, permits "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). "[I]solated discrepancies do not demonstrate the absence of a uniform standard." *Lemons v. Bradbury*, 538 F.3d

[3] The State Defendants maintain and preserve for appeal their argument that the rule announced by *Bush v. Gore* does not apply at all because the United States Supreme Court sharply limited the case's precedential significance "to the . . . circumstances" giving rise to it—*i.e.*, "a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards." *Id.* at 109.

1098, 1106 (9th Cir. 2008); *see also 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).

**B. The State Defendants' Case**

The State Defendants maintain that *Bush v. Gore* does not apply at all to Senate Bill 7066, as the United States Supreme Court expressly limited the precedential reach of that opinion to "to the . . . circumstances" giving rise to that case—*i.e.*, "a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards." *Bush*, 531 U.S. at 109. Those circumstances are a far cry from the circumstances presented in this case—*i.e.*, a duly enacted law that is unambiguous in what it requires across the State.

Should the Court find that *Bush v. Gore*'s uniformity test applies, Senate Bill 7066 survives it. As discussed below, *see infra* at 21–22, the State Defendants have taken, and continue to take, steps aimed at ensuring that all Supervisors of Elections across all of Florida's sixty-seven counties accurately determine which former felons are eligible for vote restoration and, for those who are not yet eligible, the precise steps that they must take to secure vote restoration.

## IV. TWENTY-FOURTH AMENDMENT: POLL-TAX CLAIM

### A. Legal Criteria/Elements of the Cause of Action

Section 1 of the Twenty-Fourth Amendment provides that "[t]he right of citizens of the United States to vote . . . shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV. All courts to have addressed felon voting-restoration cases agree that, "[h]aving lost their right to vote," former felons have "no cognizable Twenty-Fourth Amendment claim until their voting rights are restored." *Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010) (O'Connor, J.).[4]

The "standard definition of a tax" is "an enforced contribution to provide support for the government." *United States v. Tax Comm'n of Miss.*, 421 U.S. 599, 606 (1975) (citation omitted). In *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012), the United States Supreme Court sanctioned a "functional approach" in determining when something is, or is not, a tax, and held

[4] *See also Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000) ("[I]t is not [the felon's] right to vote upon which payment of a fee is being conditioned; rather, it is the restoration of his civil rights upon which the payment of a fee is being conditioned."); *Thompson v. Alabama*, 293 F. Supp. 3d 1313, 1332–33 (M.D. Ala. 2017) (citing *Johnson v. Bredesen*, 624 F.3d 742, 750 (6th Cir. 2010), and *Harvey*, 605 F.3d at 1080, as persuasive authority in concluding that the requirement of full payment of criminal fines, court costs, fees, and restitution as a condition for re-enfranchisement did not impose a poll tax); *Coronado v. Napolitano*, No. 07-1089, 2008 WL 191987, at *4–*5 (D. Ariz. Jan. 22, 2008) (explaining that "no right to vote exists for a poll tax to abridge because Plaintiffs were disenfranchised by reason of their convictions").

that the Affordable Care Act's individual mandate "penalty" bore the hallmarks of a tax because:

- "The '[s]hared responsibility payment,' as the statute entitles it, is paid into the Treasury by 'taxpayer[s]' when they file their tax returns";
- "It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code";
- "For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status";
- The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which . . . must assess and collect it "in the same manner as taxes";
- "This process yields the essential feature of any tax: It produces at least some revenue for the Government."

*Id.* at 563–64. And even if a measure looks like a tax (e.g., it raises revenue for the State), the United States Supreme Court has held 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." *Child Labor Tax Case*, 259 U.S. 20, 38 (1922).

**B. The State Defendants' Case**

The State Defendants maintain that none of the Plaintiffs have a cognizable Twenty-Fourth Amendment claim because, as former felons who have not yet completed all terms of their respective sentences, they have no right to vote that

could be encumbered by a tax. Every court to consider this question—three separate Circuits and two separate districts—is in accord.[5]

Should the Court disagree, then the State Defendants will show that none of the legal financial obligations required to be satisfied by Amendment 4 and Senate Bill 7066 are properly considered "taxes." The court has already found that fines and restitution are not taxes for purposes of the Twenty-Fourth Amendment. *See* ECF No. 207, at 42. Neither are the fees covered by Senate Bill 7066.

Specifically, 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. *See* Fla. Stat. § 98.0751(2)(a) ("'[c]ompletion of all terms of sentence'" refers only to the obligations "contained in the four corners of the sentencing document"). In other words, *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. *Child Labor Tax Case*, 259 U.S. at 38.

[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).

Even applying the factors listed in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519, the fines and costs required to be repaid by Amendment 4 and enumerated in Senate Bill 7066 do not constitute taxes for purposes of the Twenty-Fourth Amendment. Although they "produce[] at least some revenue for the Government," (1) "they are not paid into the Treasury by 'taxpayer[s]' when they file their tax returns"; (2) their application turns on the imposition of a felony sentence, and not whether an individual's "household income is less than the filing threshold in the Internal Revenue Code"; (3) their amount is not "determined by such familiar factors as taxable income, number of dependents, and joint filing status"; and (4) "[t]he requirement to pay" them is not "found in the [Florida] Revenue Code and enforced by the" Florida Department of Revenue, "which . . . must assess and collect [them] in the same manner as taxes." *Id.* at 563–64.

## V. PROCEDURAL DUE-PROCESS CLAIM

### A. Legal Criteria/Elements of the Cause of Action

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Procedural Due Process claims are examined under the test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Under the *Matthews* test, the Court must consider:

- "'the private interest that will be affected by the official action'";
- "'the risk of an erroneous deprivation of such interest through the procedures used'"; and
- "'the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'"

*Worthy v. Phenix City*, 930 F.3d 1206, 1223 (11th Cir. 2019) (quoting *Mathews*, 424 U.S. at 335).

### B. The State Defendants' Case

Apply the *Matthews* Factors demonstrates that the Senate Bill 7066 is not violating the Plaintiffs' procedural due process rights.

**1.** *"'[T]he private interest that will be affected by the official action'":* The interest at issue is not the right to vote. Rather, this case concerns the process for re-enfranchisement. The evidence will show that the State has been working towards

and now has a process for re-enfranchising felons who fall within the ambit of Amendment 4 (and by extension Senate Bill 7066).

**2.** *"'[T]he risk of an erroneous deprivation of such interest through the procedures used'":* The evidence will show that the State's process for re-enfranchising felons minimizes the chance of error.

**3.** *[T]he Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail'":* While the State's process for re-enfranchising voters minimizes the chance of error, the State further maintains that its process provides the best available means for re-enfranchisement because: (1) the method adheres to the text of Amendment 4 and Senate Bill 7066, (2) safeguards are built into the process to resolve ambiguity and errors in favor of re-enfranchisement, and (3) ample opportunity to be heard and rectify any errors is provided to each individual.

## VI. VOID-FOR VAGUENESS CLAIM

### A. Legal Criteria/Elements of the Cause of Action

Under the Fourteenth Amendment, "a 'basic principle of due process [is] that an enactment is void for vagueness if its prohibitions are not clearly defined.'" *Wollschlaeger v. Governor*, 848 F.3d 1293, 1319 (11th Cir. 2017) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). "Generally, the void for vagueness doctrine encompasses 'at least two connected but discrete due process concerns'":

- "'first, that regulated parties should know what is required of them so they may act accordingly'"; and
- "'second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.'"

*Id.* (quoting *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239 (2012)).

### B. The State Defendants' Case

Under either prong discussed above, Senate Bill 7066 survives the Plaintiffs' void-for-vagueness challenge. The regulated parties (all former felons) know what *Senate Bill 7066* "requires of them so they may act accordingly," *Wollschlaeger*, 848 F.3d at 1319—*i.e.*, "[c]ompletion of all terms of sentence," including "[f]ull payment of restitution ordered to a victim by the court as a part of the sentence" and [f]ull payment of fines or fees ordered by the court as a part of the sentence or that are ordered by the court as a condition of any form of supervision, including, but not limited to, probation, community control, or parole." Fla. Stat. § 98.0751(2)(A)5.

There is also no opportunity or occasion for anyone applying Senate Bill 7066 to apply it "in an arbitrary or discriminatory way." *Wollschlaeger*, 848 F.3d at 1319.

As this Court has already recognized, "[t]hat a constitutional provision or statute is not clear in all its applications does not, without more, make it impermissibly vague. ECF No. 207, at 49 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110–11 (1972)). The Court was correct when it reached this conclusion and it need not revisit it. And as the State Defendants will demonstrate at trial, any issue of "factual vagueness— the difficulty in determining the financial obligations included in a sentence and what portion has been paid," ECF No. 207, at 49–50, will be ameliorated by the procedures that have been, and will be, implemented by the Secretary.

## VII. NINETEENTH AMENDMENT CLAIM: GENDER-BASED DISCRIMINATION

### A. Legal Criteria/Elements of the Cause of Action

The Nineteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. Const. Just as "[t]he Fifteenth Amendment prohibits a State from denying or abridging" the right to vote of racial minorities, "[t]he Nineteenth Amendment does the same for women." *Mobile v. Bolden*, 446 U.S. 55, 128 (1980), *superseded by statute on other grounds*.[6] 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 for a Nineteenth Amendment violation.

### B. The State Defendants' Case

The State Defendants will show that gender-based discrimination did not motivate, in whole or in part, Senate Bill 7066's passage. At most, the Plaintiffs might be able to show that the criminal justice system as a whole imposes uniquely

[6] In *Mobile*, the Court held that the Voting Rights Act "was intended to have an effect no different from that of the Fifteenth Amendment itself." *Mobile*, 446 U.S. at 61. Congress subsequently amended the Voting Rights Act to allow discriminatory-impact claims. That does not change *Mobile*'s holding that a Fifteenth Amendment violation (and by extension, a Nineteenth Amendment violation) still requires proof of discriminatory motivation.

difficult challenges on low-income women of color as they reenter society after a felony conviction. These criticisms do not call into question the constitutionality of Senate Bill 7066, which, by its plain terms, applies equally to all former felons regardless of race, sex, or socioeconomic status. Suggesting an alleged disparate impact (which the State Defendants do not concede), particularly a disparate impact caused by alleged systemic forces far afield from Senate Bill 7066 specifically and felon re-enfranchisement provisions more generally, does not amount to a Nineteenth Amendment violation.

## VIII. *ANDERSON-BURDICK* CLAIM

### A. Legal Criteria/Elements of the Cause of Action

The *Anderson-Burdick* balancing test, which sounds in both the First and Fourteenth Amendments, *see Burdick v. Takushi*, 504 U.S. 428, 430 (1992), applies when evaluating "a law respecting the right to vote . . . ," *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring). In those cases, a court 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."

*Burdick*, 504 U.S. at 434.

### B. The Secretary's Case

The State Defendants maintain that the *Anderson-Burdick* inquiry does not apply to Senate Bill 7066 because Senate Bill 7066 does not implicate "the right to vote." *Crawford*, 553 U.S. at 204 (Scalia, J., concurring). It, like Amendment 4 itself, only respects former-felon vote restoration. For this reason, the Plaintiffs do not yet have any "asserted injury to the [voting] rights protected by the First and Fourteenth Amendments." *Burdick*, 504 U.S. at 434.

If the Court decides to apply the *Anderson-Burdick* test, the State Defendants will show that Senate Bill 7066 satisfies it. The interest at issue is Amendment 4's

restoration of felon voting rights that occurs once a former felon "complet[es] . . . all terms of sentence," Fla. Const. Art. VI, § 4(a), including "'all'—not some—[legal financial obligations] imposed in conjunction with an adjudication of guilt," In re Advisory Op. to the Governor Re: Implementation Of Amendment 4, The Voting Restoration Amendment, 288 So. 3d at 1075. Senate Bill 7066 requires no more than what Amendment 4 itself requires. For that reason, Senate Bill 7066 inflicts no "injury" whatsoever to the right at issue (*i.e.*, vote restoration under Amendment 4), and thus does not fail the *Anderson-Burdick* balance.

## IX. FIRST AMENDMENT: CORE-POLITICAL ACTIVITY CLAIM

### A. Legal Criteria/Elements of the Cause of Action

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Although it remains true that the First Amendment ensures a right to effective participation in the political process, *Meyer v. Grant*, 486 U.S. 414, 424 (1988), the Eleventh Circuit has held that "that the First Amendment provides no greater protection for voting rights than is otherwise found in the Fourteenth Amendment." *Hand*, 888 F.3d at 1210.

### B. The State Defendants' Case

The Plaintiffs appear to agree that, for the Individual Plaintiffs, their First Amendment claim rises and fall with their Equal Protection claims. For that reason, the State Defendants will show that their First Amendment claim fails for the same reasons their Equal Protection Claims fail.

With regard to the Organizational Plaintiffs, the State Defendants will show that Senate Bill 7066, does not impair or impede any First Amendment right to participate in the political process. 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).

For this reason, the State Defendants will show that Senate Bill 7066 augments, rather than impedes, the Organizational Plaintiffs' First Amendment rights. 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, the State Defendants will show that this argument fails alongside of the Plaintiffs' Procedural Due Process arguments.

## X. EIGHTH AMENDMENT: EXCESSIVE FINES CLAIM

### A. Legal Criteria/Elements of the Cause of Action

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." To determine whether a law imposes a punishment for purposes of the Eighth Amendment, the court looks first to the legislative intent at the time of the challenged statute's passage; if "the intention of the legislature was to impose punishment, that ends the inquiry." *Smith v. Doe*, 538 U.S. 84, 92 (2003) And to answer that question, court must assess "whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Hudson v. United States*, 522 U.S. 93, 99 (1997) (internal quotation marks and citation omitted).

If the legislature intended "to enact a regulatory scheme that is civil and nonpunitive," the court must then consider "whether the statutory scheme is so punitive either in purpose or effect as to negate" the legislature's non-punitive intent. *Id.* (internal quotation marks omitted). "'[O]nly the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *I*d. at 100. The non-exclusive and non-dispositive seven-factor analysis developed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963), guides this inquiry:

- "[w]hether the sanction involves an affirmative disability or restraint";
- "whether it has historically been regarded as a punishment";
- "whether it comes into play only on a finding of scienter";
- "whether its operation will promote the traditional aims of punishment—retribution and deterrence";
- "whether the behavior to which it applies is already a crime";
- "whether an alternative purpose to which it may rationally be connected is assignable for it"; and

"whether it appears excessive in relation to the alternative purpose assigned." *Id.* at 168–69.

### B. The State Defendants' Case

The State Defendants will show that neither Amendment 4 nor Senate Bill 7066 inflicts any punishment or imposes any fines, which means that it cannot violate either the Eighth Amendment's proscription on cruel and unusual punishment or excessive fines. Instead, Amendment 4 takes an existing punishment of previously indefinite duration (*i.e.*, disenfranchisement, which remained permanent without a grant of clemency) and created a new way in which the punishment may be alleviated (*i.e.*, satisfaction of certain pre-existing criminal sanctions, including all legal financial obligations imposed as part of a criminal sentence). Although "[d]isenfranchisement is punishment," *Jones*, 950 F.3d at 815, neither Amendment 4 nor Senate Bill 7066 disenfranchise anyone. Both, instead, *re-enfranhise* former felons who complete all terms of their sentence.

Application of the *Kennedy* factors further confirms that Senate Bill 7066 inflicts no punishment. Senate Bill 7066 does not impose any "affirmative disability or restraint"; it shows how to remove a previous "affirmative disability or restraint." *Kennedy*, 372 U.S. at 168–69. Re-enfranchisement, in contrast to disenfranchisement, has not "historically been regarded as a punishment." *Id.* Although requiring former felons to pay their full debt to society does "promote the traditional aims of punishment—retribution and deterrence," it remains true that the goal of both Senate Bill 7066 and Amendment 4 are restorative, not punitive. *Id.* Senate Bill 7066 contains no scienter requirement, nor does it apply to behavior that is already a crime—instead, it incentivizes behavior aimed at recompense for past crimes. *Id.* Finally, the Plaintiffs cannot show that there was any alternative purpose for Senate Bill 7066's passage other than to facilitate felon vote restoration, *see supra* at 9–14, 25–26, which means they cannot show that it is "excessive in relation to the alternative purpose assigned." *Id.*

## XI. NATIONAL VOTER REGISTRATION ACT CLAIM

### A. Legal Criteria/Elements of the Cause of Action

The National Voter Registration Act provides that "each State shall . . . inform applicants of . . . voter eligibility requirements[] and penalties provided by law for submission of a false voter registration application." 52 U.S.C. § 20507(a)(5). It also provides that "[t]he mail voter registration form . . . shall include a statement that:

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury

*Id.* § 20508(b)(2)(a). It further mandates that "[t]he voter registration application portion of an application for a State motor vehicle driver's license . . . may require only the minimum amount of information necessary to . . . prevent duplicate voter registrations[] and enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process. *Id.* § 20504(c)(2)(B). And finally, it requires that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. § 20507(b)(1).

### B. The State Defendants' Case

Only the *Gruver* and *Raysor* plaintiffs allege NVRA claims; however, neither plaintiff group can maintain the claims. All of the individual *Gruver* plaintiffs are registered to vote. Thus, the *Gruver* plaintiffs allege no concrete and particularized Article III injury as to their NVRA claim—their registration-related claim. The *Raysor* plaintiffs do not allege completion of a statutory condition precedent to bringing the claim, namely their compliance with the 90-day notice requirement.

Even if an injury-in-fact does exist and all conditions precedent have been satisfied, the State's registration process complies with the NVRA. The State continues to make available several means of registration such as the Federal Post Card Application for absent uniformed service members, their families, and U.S. citizens living abroad; and the national mail-in application form prescribed by the U.S. Election Assistance Commission. Of particular relevance, the State also has available the form required by Rule 1S-2.040 of the Florida Administrative Code—a rule that predates passage of Senate Bill 7066. While rulemaking is ongoing, the Rule 1S-2.040 has not been amended or repealed in any way. The rulemaking itself is expected to result in a rule that comports with the NVRA and the concerns this Court expressed at the preliminary injunction hearing in this case.

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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 in Local Rule 7.1(F); this motion contains 6,817 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 fourteenth day of April, 2020.

*/s/ Edward M. Wenger*
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