No. 20-12003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Kelvin Leon Jones, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

APPELLEES' RESPONSE TO PETITION FOR INITIAL HEARING *EN BANC*

Julie A. Ebenstein
R. Orion Danjuma
Jonathan S. Topaz
Dale E. Ho
American Civil Liberties Union Foundation, Inc.
125 Broad St.,18th Fl.
New York, NY 10004
(212) 284-7332

Counsel for Gruver Plaintiffs-Appellees

Nancy G. Abudu
Caren E. Short
Southern Poverty Law Center
P.O. Box 1287
Decatur, Ga 30031
(404) 521-6700

Counsel for McCoy Plaintiffs-Appellees

Paul M. Smith
Danielle M. Lang
Mark P. Gaber†
Molly E. Danahy
Jonathan M. Diaz
Campaign Legal Center
1101 14th St. NW, Ste. 400
Washington, DC 20005
(202) 736-2200

Counsel for Raysor Plaintiffs-Appellees

Additional Counsel Listed on Inside Cover

Sean Morales-Doyle
Eliza Sweren-Becker
Myrna Pérez
Wendy Weiser
Brennan Center for Justice at NYU
School of Law
120 Broadway, Ste. 1750
New York, NY 10271
(646) 292-8310

Leah C. Aden
John S. Cusick
Sherrilyn Ifill
Janai S. Nelson
Samuel Spital
NAACP Legal Defense and
Educational Fund, Inc.
40 Rector Street, 5th Fl.
New York, NY 10006
(212) 965-2200

Jennifer A. Holmes
NAACP Legal Defense and
Educational Fund, Inc.
700 14th St., Ste. 600
Washington D.C. 20005
(202) 682-1500

Counsel for Gruver Plaintiffs-Appellees

† Appointed Counsel for Certified
Plaintiff Class

Chad W. Dunn†
(Fla. Bar No. 119137)
Brazil & Dunn
1200 Brickell Ave., Ste. 1950
Miami, FL 33131
Tel: (305) 783-2190

Counsel for Raysor Plaintiffs-Appellees

Daniel Tilley
Anton Marino
American Civil Liberties Union
Foundation of Florida
4343 West Flagler St., Ste. 400
Miami, FL 33134
(786) 363-2714

Pietro Signoracci
David Giller
Paul, Weiss, Rifkind, Wharton &
Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

Counsel for Gruver Plaintiffs-Appellees

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the NAACP Legal Defense and Educational Fund, Inc., the American Civil Liberties Union Foundation, Inc., the American Civil Liberties Union Foundation of Florida, Inc., the Brennan Center for Justice at NYU School of Law, Brazil & Dunn, Campaign Legal Center, Paul Weiss Rifkind Wharton & Garrison LLP, the League of Women Voters of Florida, the Florida State Conference of Branches and Youth Units of the NAACP, and the Orange County Branch of the NAACP state that they have no parent corporations, nor have they issued shares or debt securities to the public. The organizations are not subsidiaries or affiliates of any publicly owned corporation, and no publicly held corporation holds ten percent of their stock. I hereby certify that the disclosure of interested parties submitted by Defendants-Appellants Governor of Florida and Secretary of State of Florida is complete and correct except for the following corrected or additional interested persons or entities:

1. Brnovich, Mark, Attorney General of Arizona, *Counsel for Amicus Curiae*
2. Cameron, Daniel, Attorney General of Kentucky, *Counsel for Amicus Curiae*

3. Carr, Christopher M., Attorney General of Georgia, *Counsel for Amicus Curiae*
4. Cesar, Geena M., *Attorney for Defendant*
5. Commonwealth of Kentucky, *Amicus Curiae*
6. Consovoy, William S., *Counsel for Amicus Curiae*
7. Curtis, Kelsey J., *Counsel for Amicus Curiae*
8. Ebenstein, Julie A., *Attorney for Gruver Plaintiffs/Appellees*
9. Fairbanks Messick, Misty S., *Counsel for Amicus Curiae*
10. Harris, Jeffrey M.*, Counsel for Amicus Curiae*
11. Hoffman, Lee, *Plaintiff/Appellee*
12. Ifill, Sherrilyn A., *Attorney for Plaintiffs/Appellees*
13. LaCour, Edmund G., Jr., *Counsel for Amicus Curiae*
14. Landry, Jeff, Attorney General of Louisiana, *Counsel for Amicus Curiae*
15. Marshall, Steve, Attorney General of Alabama, *Counsel for Amicus Curiae*
16. Moody, Ashley, *Attorney for Defendant/Appellant*
17. Paxton, Ken, Attorney General of Texas, *Counsel for Amicus Curiae*
18. Peterson, Doug, Attorney General of Nebraska, *Counsel for Amicus Curiae*
19. Phillips, Kaylan L., *Counsel for Amicus Curiae*
20. Reyes, Sean, Attorney General of Utah, *Counsel for Amicus Curiae*
21. Rutledge, Leslie, Attorney General of Arkansas, *Counsel for Amicus Curiae*

22. State of Alabama, *Amicus Curiae*
23. State of Arizona, *Amicus Curiae*
24. State of Arkansas, *Amicus Curiae*
25. State of Georgia, *Amicus Curiae*
26. State of Louisiana, *Amicus Curiae*
27. State of Nebraska, *Amicus Curiae*
28. State of South Carolina, *Amicus Curiae*
29. State of Texas, *Amicus Curiae*
30. State of Utah, *Amicus Curiae*
31. Valdes, Michael B., *Attorney for Defendant*
32. Wenger, Edward M., *Attorney for Defendants/Appellants*
33. Wilson, Alan, Attorney General of South Carolina, *Counsel for Amicus Curiae*

Dated: June 19, 2020

Respectfully submitted,

/s/ Paul M. Smith
Paul M. Smith

Counsel for Raysor Plaintiffs-Appellees

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INTRODUCTION

Florida enacted a pay-to-vote system that turns on wealth and payment of costs and fees that are functionally identical to taxes. The State has not begun any comprehensive review of voters' eligibility under this system and does not anticipate completing such until 2026. This scheme violates the Constitution in numerous ways.

The judgment below adhered to decisions from the Supreme Court, this Court sitting *en banc*, and this Court in *Jones I*,[1] which unanimously held that wealth cannot determine one's eligibility to vote. The plain text of the Twenty-Fourth Amendment bars Florida from denying access to the franchise based on failure to pay any tax. And the trial record makes clear that the pay-to-vote system would fail even rational basis review and that the State's[2] failure to administer the system violates due process.

Initial *en banc* review is unwarranted. In fact, a decision to grant initial *en banc* review under these circumstances would be unprecedented.[3] The judgment

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[1] *Jones v. Governor of Florida*, 950 F.3d 795 (11th Cir. 2020).

[2] Plaintiffs-Appellees refer to Defendants-Appellants as "the State."

[3] This Court has granted initial hearing *en banc* in only a handful of cases in its history and in circumstances not present here: to determine precedential value of decisions of the former Fifth Circuit, *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), to clarify requirements that affected "hundreds of cases a year in this Circuit," *Hunter v. United States*, 101 F.3d 1565, 1568 (11th Cir. 1996), when both parties agreed Circuit precedent was wrong, *United States v. Goldin Industries,*

below does not create intra-Circuit conflict, much less precedent-setting error. Fed. R. App. P. 35(a); 11th Cir. R. 35-3. Quite the opposite; it provides a straightforward application of binding Supreme Court precedent to careful factual findings.

Moreover, this Court already declined the State's invitation to vacate *Jones I*'s wealth discrimination holding—and did so at a time when *en banc* review could have proceeded without unduly risking voter confusion prior to the November 2020 election. The State likewise could have sought *certiorari* of *Jones I* but did not. It would make no sense to disturb voters' settled expectations.

The State's petition regurgitates its prior rehearing *en banc* petition, which this Court denied; misstates the Supreme Court's, this Court's, and other Circuits' precedent; and mischaracterizes the proceedings in this case. It should be denied.

ARGUMENT

I. The *Jones* Panel Properly Applied this Court's and Supreme Court Precedent.

"A state cannot allow one citizen to vote but not an otherwise-identically-situated second citizen when the only difference is wealth—when the first citizen has money and so can pay a debt but the second citizen does not have money and cannot pay the same debt." Order Denying Stay at 5, Doc. 431; *see Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667-68 (1966) ("[A] State violates the

Inc., 219 F.3d 1268 (11th Cir. 2000), and to address issues related to intervening Supreme Court precedent, *United States v. Durham*, 795 F.3d 1329 (11th Cir. 2015).

Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."); *see Johnson v. Governor of Fla.*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005) (*en banc*) ("Access to the franchise cannot be made to depend on an individual's financial resources."). This is the unremarkable proposition that the State says requires initial *en banc* review. Nor is it any more remarkable that *Jones I* applied this rule even "when the debt arose from a criminal sentence." Order Denying Stay at 5, Doc. 431. Indeed, outside the context of the right to vote, the Supreme Court has most closely scrutinized wealth-based discrimination in the context of criminal punishment. *See Griffin v. Illinois*, 351 U.S. 12 (1956)*; Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Mayer v. City of Chicago*, 404 U.S. 189 (1971); *Bearden v. Georgia*, 461 U.S. 660 (1983). The Court has no power to abrogate this Supreme Court precedent, which compelled the district court's decision.

The State nevertheless contends that this appeal merits initial hearing *en banc* because the *Jones I* panel's determination of the wealth discrimination claim contravened "binding precedent of this Circuit in three ways." Pet. at 8. But there is no conflict in Circuit authority. And despite repeated opportunities throughout the course of this litigation to distinguish a controlling line of Supreme Court precedent—including *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), *Bearden*, 461 U.S. 660, *Harper,* 383 U.S. 663, and *Griffin*, 351 U.S. at 18—the only arguments presented in

the petition are theories directly refuted by these well-established precedents. Because *Jones I* faithfully applied not only this Court's precedent but also Supreme Court precedent that binds the *en banc* court, initial hearing *en banc* is not warranted.

A. *Jones I* Follows Controlling Supreme Court Wealth Discrimination Precedent.

While wealth is not a traditional suspect class, for over sixty years the Supreme Court has consistently held that "equal justice" does not permit the State to deny access to a significant interest or impose additional punishment based solely on inability to pay, even when the State has no initial obligation to extend the benefit or right. *See Griffin*, 351 U.S. at 16 (holding that access to a criminal appeal cannot hinge on ability to pay). The Supreme Court has held that *Griffin*'s principle of "equal justice for poor and rich, weak and powerful alike," 351 U.S. at 16*,* applies "in at least two discrete areas: the administration of criminal justice and access to the franchise." *Jones I*, 950 F.3d at 817; *see M.LB.*, 519 U.S. at 123.

As the Court stated in *M.L.B.,* both of these exceptions are "solidly establish[ed]." 519 U.S. at 124. In *Harper*, the Supreme Court cited *Griffin* in holding that "wealth . . . is not germane" to voting. 383 U.S. at 668; *see id.* ("To introduce wealth . . . as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."). And the Court has since applied this principle expansively, closely scrutinizing candidate filing fees because their impact on the franchise "is related to the resources of the voters supporting a particular candidate."

Bullock v. Carter, 405 U.S. 134, 144 (1972); *see Lubin v. Panish*, 415 U.S. 709, 718 (1974) ("Selection of candidates solely on the basis of ability to pay a fixed fee . . . is not reasonably necessary to the accomplishment of the State's legitimate election interests."). Because Florida does precisely what *Harper* prohibits—makes affluence an electoral standard for otherwise eligible voters unable to pay their outstanding legal financial obligations ("LFOs")—it violates the Fourteenth Amendment.

Likewise, the Court has repeatedly held that the level of punishment imposed on criminal defendants cannot turn on ability to pay. *See Bearden,* 461 U.S. at 672-73 (holding that a state may not revoke probation—thereby extending a prison term—based on a defendant's inability to pay a fine); *Tate v. Short*, 401 U.S. 395, 399 (1971) (holding that a state cannot imprison an indigent defendant based solely on inability pay a fine); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (holding that a period of imprisonment cannot be extended on the basis that an indigent person cannot pay a fine). Because the continuation of felony disenfranchisement is inherently punitive—indeed the only rationale provided by the State in its petition is retribution, Pet. at 15—that punishment cannot be imposed or withheld based on the size of one's pocketbook. *Bearden*, 461 U.S. at 671, 673; *see United States v. Plate*, 839 F.3d 950, 956 (11th Cir. 2016) ("Plate was treated more harshly in her sentence

than she would have been if she (or her family and friends) had access to more money, and that is unconstitutional.").

Under Florida's pay-to-vote requirement, "the punishment itself takes the form of denying access to the franchise," *Jones I*, 950 F.3d at 820. *Jones I* correctly held that this system sits at the intersection of the Supreme Court's wealth discrimination precedent, and triggers heightened scrutiny:

> Quite simply, two strands of Supreme Court law—those embodied in its *Griffin–Bearden* line of cases outlawing different levels of punishment for similarly situated defendants, solely on account of wealth, and those found in the *Harper* line of cases underscoring the importance of access to the ballot—run together in this case. These weighty interests are directly implicated and they yield the conclusion that we must examine the Amendment's impact . . . through the lens of heightened scrutiny.

Id. at 825.

Because the State does not contend—nor could it—that Florida's pay-to-vote requirement survives heightened scrutiny, the district court correctly concluded that it must fall, at least as applied to those unable to pay.

B. *Jones I* Properly Applies this Court's Precedent.

Each of the State's asserted conflicts with Circuit precedent are without merit. The State contends that initial *en banc* review is necessary to restore the requirement that "[a]n equal-protection plaintiff must show that the government 'selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.'" Pet. at 9 (quoting *Personnel*

Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)). And the State argues that *Hand v. Scott* reaffirmed this principle in the context of felony disenfranchisement and therefore controls. 888 F.3d 1206, 1207 (11th Cir. 2018).

But this precise argument—that plaintiffs must prove purposeful discrimination in cases involving ability to pay—has been rejected by the Supreme Court. *See M.L.B.*, 519 U.S. at 125-127 (holding that *Washington v. Davis*, 426 U.S. 229 (1976) and *Feeney* do not control in wealth discrimination cases because sanctions that differ depending on payment of fines and fees "are wholly contingent on one's ability to pay, and thus 'visi[t] different consequences on two categories of persons'") (quoting *Williams*, 399 U.S. at 242).

The State next endeavors to confine *M.L.B.*'s holding to cases concerning access to judicial proceedings. But the doctrine is not so limited. *See Jones I*, 950 F.3d at 820. *M.L.B.* relied on *Bearden*—a case about probation, not judicial process—and *Bearden* in turn relied upon *Griffin* to make the same point. 519 U.S. at 127 ("In sum, under respondents' reading of *Washington v. Davis,* our overruling of the *Griffin* line of cases would be two decades overdue. . . . *See Bearden v. Georgia,* 461 U.S. at 664-665 (adhering in 1983 to "*Griffin*'s principle of 'equal justice'")"). It does not "face actuality" to suggest that *M.L.B.*'s direct rejection of the State's argument does not apply merely because *M.L.B.* addressed access to parental terminations proceedings. Pet. at 24; *see M.L.B.*, 519 U.S. at 123-24 ("[t]he

basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.").

Indeed, setting *M.L.B.* aside, the argument that the challenged laws are facially neutral and thus constitutional has been made—and rejected—since the very first wealth discrimination case. As Justice Frankfurter explained in *Griffin*:

> Of course a State need not equalize economic conditions. . . . But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review . . . .

351 U.S. at 23 (Frankfurter, J., concurring). Likewise, when a State establishes a system of voting rights restoration, it cannot draw a line that precludes convicted indigent persons from securing access to the franchise. *See Williams*, 399 U.S. at 242 (1970) (applying heightened scrutiny because the "operative effect" of a facially neutral statute distinguished between those who can pay and those who cannot); *Tate v. Short*, 401 U.S. 395, 399 (1971) (same).[4]

Hand v. Scott is also inapt. That case did not involve wealth discrimination, but rather challenged Florida's "purely discretionary" clemency process, and in that context, this Court held the plaintiffs were required to establish purposeful

[4] For the same reasons as those stated in *Griffin*, the inclusion of a fines and fees requirement necessarily shows an intent to burden those unable to pay. It is a facial classification on the basis of wealth. Thus, the district court has specifically found that the Legislature intended to "prefer those with money over those without." Order Denying Stay at 8, Doc. 431.

discrimination rather than mere arbitrary treatment. 888 F.3d at 1209. Here, by contrast, "the State has opted to automatically re-enfranchise felons" on a categorical basis, *Jones I* 950 F.3d at 820, but has circumscribed such automatic re-enfranchisement on the basis of wealth. Thus, purposeful discrimination is unnecessary in this context: "the Supreme Court has squarely held that *Davis*'s intent requirement is not applicable to wealth discrimination cases." *Jones I*, 950 F.3d at 828 (citing *M.L.B*., 519 U.S. at 126-27); *id*. ("Moreover, the Supreme Court has never required proof of discriminatory intent in a wealth discrimination case[.]").

Next, the State contends that *Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978), established that "rational-basis review [applies] to equal protection challenges of non-suspect classifications made by felon disenfranchisement and reenfranchisement laws." Pet. at 11. But there is no conflict in precedent. *Shepherd* stands for the basic proposition that felony disenfranchisement laws do not, by themselves, trigger heightened scrutiny. *See Jones*, 950 F.3d at 824 ("*Shepherd* got it right, *because the classification did not implicate wealth* or any suspect classification."). But *Shepherd* does not stand for the proposition that felony disenfranchisement laws are *immune* from heightened scrutiny under the Equal Protection Clause. *Shepherd,* 575 F.2d at 1115 ("[W]e are similarly unable to accept the proposition that section 2 removes all equal protection considerations from state-created classifications denying the right to vote to some felons while granting it to

others."); *see Hunter v. Underwood*, 471 U.S. 222 (1985) (striking down criminal disenfranchisement law as racially discriminatory); *Richardson v. Ramirez*, 418 U.S. 24 (1974) (remanding for Equal Protection analysis). Because the *Griffin-Harper-Bearden* line of wealth discrimination cases trigger heightened scrutiny, *see supra*, *Shepherd*'s rational basis review is inapposite.

In an attempt to circumvent the Supreme Court's wealth discrimination doctrine, the State erroneously asserts that "there is no '*Griffin-Bearden*' line of cases." Pet. at 12. Moreover, the State incorrectly contends that *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018) specifically cabined the *Griffin* line of cases to judicial process. Pet. at 13.

Walker says the opposite of what the State contends. In *Walker*, it was the *dissent* that argued that the limiting principle of *Griffin* would be its cabined application to access to judicial process and *Walker*'s majority opinion held that such a limitation was unprincipled and *ad hoc*. 901 F.3d at 1264. Instead, *Walker* held that the correct analysis in that case would follow *Bearden* and *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (*en banc*). *Walker* simply confirms that *Griffin* and *Bearden* are binding.

Walker's treatment of the *Griffin-Bearden* cases as one coherent doctrine is borne out in each of the Court's wealth discrimination cases. Indeed, every wealth discrimination case discussed herein cites back to *Griffin* for its origins, including

Bearden, Williams, and *Tate* (the cases the State contends make up the *Bearden* line of precedent). *Harper* also cites to *Griffin* for its holding that voting cannot be contingent on wealth. Thus, the State's assertion that *Jones I* "did not invoke a single precedent applying *Griffin* beyond access to judicial process," Pet. at 13, is demonstrably false. And the State's assertion that *Bearden* is limited to imprisonment is belied by *Bearden* itself. The test set out by *Bearden*—the first factor of which is "the nature of the individual interest affected," 461 U.S. at 666-67—would be nonsensical if *Bearden* only applied to incarceration. *See also M.L.B.*, 519 U.S. at 111 ("*Griffin*'s principle has not been confined to cases in which imprisonment is at stake.").

Jones I does not contradict *Hand*, *Shepherd*, or *Walker.* To the contrary, *Jones I* is consonant with these opinions, faithfully applies well-established Supreme Court precedent, and accords with this Court's *en banc* decision in the specific context of restoration of voting rights for individuals with felony convictions. *See Johnson*, 405 F.3d at 1216 n.1 (citing *Harper* and noting that "[a]ccess to the franchise cannot be made to depend on an individual's financial resources" in the context of felony re-enfranchisement).

Initial *en banc* review is further unwarranted because the judgment does not depend on whether heightened scrutiny applies. The district court made a factual finding based on a substantial trial record that the mine-run of people with past

felony convictions are unable to pay LFOs. The State offered no contrary evidence, and does not contest that finding as clearly erroneous. Applying the standard set forth in *Jones I*, the district court thus concluded Florida's pay-to-vote system fails rational basis review because it is irrational for the State to require payment when the majority of individuals are unable to pay. Op. at 39.[5] Given these facts, *Jones I* makes clear that the pay-to-vote system is unconstitutional even under rational basis review. 950 F.3d at 814-17

II. The District Court Correctly Applied Supreme Court Precedent in its Twenty-Fourth Amendment Ruling.

The district court ruled that Florida violates the Twenty-Fourth Amendment by conditioning eligibility to vote on the payment of fees and costs. That ruling is consistent with Supreme Court and Eleventh Circuit precedent and does not require initial *en banc* review.

As a threshold matter, the State's contention that the Twenty-Fourth Amendment does not apply to those with prior felony convictions is wrong. People

[5] The State now contends it can rationally "insist that felons repay their debt to society in full before they will be permitted to rejoin the electorate, and that is true even for those unable to pay and even if the majority of felons are unable to pay." Pet. at 29. This is a reversal; the State previously conceded it could only survive rational basis review "[a]bsent any evidence that felons unable to pay their outstanding legal financial obligations vastly outnumber those able to pay." Defs.' Br. at 43, *Jones I*. Now, in the face of such evidence, the State argues that it is entitled—as a matter of retribution—to administer its pay-to-vote system. But a state cannot punish someone for their poverty. *See Bearden*, 461 U.S. at 671.

with felony convictions may not be denied the franchise for unconstitutional reasons. *Richardson*, 418 U.S. at 24 (remanding to address Plaintiffs' disparate treatment claim under the Equal Protection Clause); *Jones I*, 950 F.3d at 817-823 (applying heightened scrutiny); *Johnson*, 405 F.3d at 1216 n.1 (*citing Harper*, 383 U.S. at 668).

The Twenty-Fourth Amendment provides that the right to vote "shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV, § 1. As the State has emphasized, "words matter."[6] The Twenty-Fourth Amendment "clearly and literally bars any State from imposing a poll tax on the right to vote" in federal elections, and the Supreme Court has "reject[ed] the notion that Art. II, s 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). Thus, while felon disenfranchisement may be generally permissible under *Richardson*, states may not condition rights restoration on a tax.

Florida's requirement that returning citizens pay fees and costs in order to vote is plainly an "other tax" in violation of the Twenty-Fourth Amendment. Under the test articulated in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB*"), the district court found that "the fees are assessed regardless of whether a defendant is adjudged guilty, bear no relation to culpability, and are

[6] Doc. 132 at 32.

assessed for the sole or at least primary purpose of raising revenue to pay for government operations[.]" Op. at 78. Thus, the court held that fees and costs imposed on criminal defendants in Florida are functionally taxes, and conditioning voting on payment of those fees and costs violates the Twenty-Fourth Amendment. *Id*. at 78-79.

Contrary to the State's contention, the district court did not stray from out-of-Circuit precedent. Like those Circuits, the court concluded that Florida could condition voting on payment of fines and restitution without violating the Twenty-Fourth Amendment. *See Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010) (holding that restitution is not a tax under the Twenty-Fourth Amendment); *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010) (holding that fines and restitution are not taxes under the Twenty-Fourth Amendment). Neither *Bredesen* nor *Brewer* addresses the question of whether conditioning rights restoration on the payment of fees and costs runs afoul of the Twenty-Fourth Amendment. There is no conflict.

III. The Pay-To-Vote System Violates Due Process.

Initial *en banc* review of the district court's procedural due process ruling and injunction is unwarranted. Under the pay-to-vote system Floridians are ineligible to register and vote if they have outstanding disqualifying LFOs. This system is backed by criminal sanction. Op. at 67. Through trial, the State demonstrated a "staggering inability to administer the pay-to-vote system," *Id*. at 44. Indeed, the State admitted

that in the 18 months since Amendment 4 went into effect, it has not made a single determination of potential ineligibility based on outstanding LFOs, including with respect to the individual Appellees. *Id.* at 65; *see also id.* at 15 (noting that even with a "team of attorneys and unlimited time, the State has been unable to show how much each plaintiff must pay to vote under the State's view of the law.").

In light of the State's inability to administer the pay-to-vote system, the court further found that the threat of criminal sanctions attendant on registering or voting while ineligible created a strong deterrent effect on eligible voters. *Id*. at 66-67, 98-99. The court specifically found this was true with respect to citizens who are eligible to vote based on the State's own interpretation of the pay-to-vote system, but who had no way to determine their rights and obligations. *Id.* at 67.

The State asserted that these concerns could be resolved through the Secretary of State's existing advisory opinion process. *See Id*. at 113. Now that the district court has adopted the State's proposal, the State contends that "one would be hard-pressed to find a greater intrusion on State sovereignty." Pet. at 3.

The district court respected—rather than infringed—the State's sovereignty in crafting a remedy. And the minor modifications the court made are reasonable in light of the State's failure to craft its own workable procedure. Prescribing a form for use by voters does not intrude on state sovereignty. And, the injunction does not require the State to provide an advisory opinion by a deadline, or at all. Order

Denying Stay at 11-12, Doc. 431. Instead, it simply provides voters a safe harbor if the State does not provide them with constitutionally adequate pre-deprivation notice within a reasonable time. This does not warrant initial *en banc* review.

CONCLUSION

The petition for initial hearing *en banc* should be denied.

Respectfully submitted,

/s/ Julie A. Ebenstein
Julie A. Ebenstein
Fla. Bar No. 91033
R. Orion Danjuma
Jonathan S. Topaz
Dale E. Ho
American Civil Liberties Union Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004
(212) 284-7332
jebenstein@aclu.org
odanjuma@aclu.org
jtopaz@aclu.org
dho@aclu.org
Sean Morales-Doyle
Eliza Sweren-Becker
Myrna Pérez
Wendy Weiser
Brennan Center for Justice at NYU School of Law
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8310
sean.morales-doyle@nyu.edu
eliza.sweren-becker@nyu.edu
myrna.perez@nyu.edu

/s/ Paul M. Smith
Paul M. smith
Danielle M. Lang
Mark P. Gaber†
Molly E. Danahy
Jonathan M. Diaz
Campaign Legal Center
1101 14th Street NW, Ste. 400
Washington, DC 20005
Tel: (202) 736-2200
psmith@campaignlegal.org
dlang@campaignlegal.org
mgaber@campaignlegal.org
mdanahy@campaignlegal.org
jdiaz@campaignlegal.org
bbowie@campaignlegal.org

Chad W. Dunn†
(Fla. Bar No. 119137)
Brazil & Dunn
1200 Brickell Ave., Ste. 1950
Miami, FL 33131
Tel: (305) 783-2190
chad@brazilanddunn.com

Counsel for Raysor Plaintiffs-Appellees
† Class Counsel

wendy.weiser@nyu.edu

Leah C. Aden
John S. Cusick
Sherrilyn Ifill
Janai S. Nelson
Samuel Spital
NAACP Legal Defense and
Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
laden@naacpldf.org
jcusick@naacpldf.org
jnelson@naacpldf.org
sspital@naacpldf.org

Jennifer A. Holmes
NAACP Legal Defense and
Educational Fund, Inc.
700 14th Street, Suite 600 Washington
D.C. 20005
(202) 682-1500
jholmes@naacpldf.org

Daniel Tilley
Fla. Bar No. 102882
Anton Marino
Fla. Bar No. 1021406
American Civil Liberties Union
Foundation of Florida
4343 West Flagler St., Suite 400
Miami, FL 33134
(786) 363-2714
dtilley@aclufl.org
amarino@aclufl.org

Pietro Signoracci
David Giller
PAUL, WEISS, RIFKIND,

/s/ *Nancy G. Abudu*
Nancy G. Abudu
Fla. Bar No. 111881
Caren E. Short
SOUTHERN POVERTY LAW
CENTER
P.O. Box 1287
Decatur, Georgia 30031-1287
Tel: 404-521-6700
Fax: 404-221-5857
nancy.abudu@splcenter.org
caren.short@splcenter.org

Counsel for McCoy Plaintiffs-Appellees

WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Psignoracci@paulweiss.com
Dgiller@paulweiss.com

Counsel for Gruver Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

I certify that this Response complies with the type-volume limitations of Fed. R. App. P. 35 because it contains 3,861 words.

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Date: June 19, 2020

/s/ Paul M. Smith
Paul M. Smith
Counsel for Raysor Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on June 19, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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/s/ Paul M. Smith
Paul M. Smith
Counsel for Raysor Plaintiffs-Appellees