UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Kelvin Jones, et al.

Plaintiffs,

v. Consolidated Case No. 4:19-cv-300-RH-CAS

Ron DeSantis, et al.,

Defendants.

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, FOR FURTHER RELIEF

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INTRODUCTION[1]

There is no dispute that Senate Bill 7066 (2019) ("SB7066") would disqualify hundreds of thousands of individuals with felony convictions ("returning citizens") from registering and voting due to outstanding fines, fees, and restitution (legal financial obligations, or "LFOs"). The evidence uncovered since filing Plaintiffs' opening briefs makes clear that Florida is unable to implement and administer the LFO provisions of SB7066. By their own admissions, Defendants[2] *do not currently know* how to determine whether returning citizens have disqualifying LFOs. Discovery thus far has exposed a stunning lack of clarity, uniformity, or preparation for administering this law.

Despite SB7066's July 1 effective date, as of today:

- Neither returning citizens nor state election officials have access to accurate and complete records identifying LFOs pertinent to eligibility under SB7066. Indeed, credible and reliable data on outstanding LFOs *does not exist*—even for in-state convictions. Data on outstanding LFOs for out-of-state or federal convictions is unavailable.

- The Secretary of State ("Secretary" or "Department") *does not know* which LFOs are disqualifying under SB7066; provides no guidance to Supervisor of Elections ("SOEs") on SB7066's LFO requirements; and provides no guidance to voters on which LFOs are disqualifying.

[1] This memorandum is filed jointly by all Plaintiffs in the four cases consolidated under case number 4:19-cv-300-RH-CAS.

[2] Because Defendants DeSantis and Lee, joined by Antonacci, White, and Cowles, filed the principal brief in opposition, this document uses the term "Defendants" to refer to those parties except where specified. Their brief is referred to as "Opp." Other Supervisors of Election are referred to as "SOEs" or "SOE Defendants."

- Election officials in Florida *will not* advise Florida citizens of whether their outstanding LFOs are disqualifying.

- Because she does not have the means to do so with any accuracy, the Secretary is currently *not implementing* SB7066's LFO requirements.

- Florida law imposes criminal liability for registration and voting by ineligible individuals. Returning citizens with LFOs have no notice of whether registering or voting might subject them to criminal liability.

The lack of any functional system for determining eligibility violates fundamental principles of due process and equal protection. SB7066 creates fear and uncertainty regarding eligibility, undermines automatic rights restoration, unduly burdens returning citizens voting rights, and chills participation in the democratic process. Even setting aside the profoundly deficient implementation of SB7066, binding case authority—ignored by Defendants—holds that it is unconstitutional to condition access to the franchise on payment of debts that Plaintiffs cannot afford.

The central purpose of a preliminary injunction is to preserve the status quo prior to an unlawful action and prevent irreparable injury. The State cannot legitimately assert an interest in administering a law that it concedes it does not yet know how to implement. Prospective voters need a minimum level of clarity and certainty about their eligibility to register and vote. Only the Court can provide that clarity now by preliminarily enjoining SB7066.

ARGUMENT

I. Recent Discovery Demonstrates That Neither Potential Voters nor Election Officials Can Navigate SB7066's LFO Restrictions.

Defendants propose that only "people who believe that they have satisfied 'all [financial] terms of sentence' may continue registering to vote." Opp., Doc. 152, at 10.[3] But the evidence demonstrates that neither state officials nor potential voters can achieve any meaningful "belief" about their eligibility due to complete confusion regarding what payments must be made and what records provide that information.

SB7066 defines completion of a sentence to include satisfaction of certain, but not all, LFOs associated with a felony conviction. Only LFOs contained within the "four corners of the sentencing document" are disqualifying. Fla. Stat. §98.0751(2)(a). LFOs that accrue after the time of sentencing are not disqualifying. *Id.* But election officials cannot identify which records constitute "*the* sentencing document" central to SB7066's interpretation. Brown Dep., Doc. 152-85, 131:14-25; Matthews Dep., Doc. 152-93, 144:16-21; 8/14/19 Email, Doc. 167-87 (email between Matthews and staff indicating confusion over documents within "four corners of judgment"). Defendants are similarly unable to disaggregate fines, fees,

[3] Because Plaintiffs have already filed exhibits supporting their motion for preliminary injunction pursuant to this Court's Order, Doc. 107, this memorandum cross-references these previously filed exhibits using the conventions in the attached Index.

or costs that "accrue after the date the obligation is ordered." Fla. Stat. §98.0751(2)(a)(5)(c); *see also* Matthews Dep. 182:3-13; 187:6-10; Brown Dep. 143:2-5, 148:18-21; Barton Dep., Doc. 153-3, 107:17-108:6; 117:17-21; Earley Dep., Doc. 152-52, 186:7-22. As a result, the officials charged with administering this law cannot determine which LFOs fall under SB7066 and which do not. The Director of the Division of Elections, Maria Matthews admits her office is "still working" to determine "what [LFOs] are part of the sentence and the current status of those legal financial obligations." Matthews Decl., Doc. 152-94, ¶23; *see also* Brown Dep. 142:6-13; 151:3-4 ("I am still unclear as to what fines and fees have been completed.");[4] Earley Dep. 186:23-187:2; Barton Dep. 107:6-14.

Counties typically rely on guidance from the Department for assessing voter eligibility. Latimer Dep., Doc. 152-80, 88:14-15; 89:24-90:5. But because the Department does not know the answer to basic questions about the scope of SB7066, it has not provided any guidance to county SOEs on how they should assess voter eligibility. Brown Dep. 58:2-6; Arrington Dep., Doc. 152-24, 89:22-25; Hogan Dep., Doc. 152-88, 127:4-25. Thus, SOEs are similarly unable to

[4] In part, this is because the documents used in sentencing vary from county to county within Florida (and across states and federal courts). Matthews Dep. 183:4-7 (Director Matthews testifying that she "know[s] for a fact" that not all 67 counties use the same format for sentencing documents.); Usztok Email, Doc. 152-86; Burke Email, Doc. 167-45; Sample Judgment, Doc. 167-51. Further, which particular LFOs are contained within the various documents related to an individual's sentence or are included in the terms of supervision also vary. *See, e.g.*, Martinez Decl., Doc. 170-3, at ¶¶3-4.

determine which LFOs are disqualifying under SB7066. Arrington Dep. 87:10-17, 88:2-8; Barton Dep. 106:3-19; 107:6-10; Earley Dep. 183:15-184:3. If the State itself cannot determine which LFOs are disqualifying, potential voters certainly cannot be expected to know, and neither the Department nor local election officials will assist voters in making that necessary determination. Brown Dep. 112:22-25, 132:13-21 (describing how returning citizens could know if they have paid disqualifying LFOs: "I don't know how they would be able to get that information"); Barton Dep. 89:8-90:1; 115:9-19.[5] Ultimately, the Department's position is that returning citizens "are the ones on the hook for determining whether they are eligible or not." Matthews Dep. 179:23-25; *id.* at 179:25-189:4.

Moreover, there is no credible or reliable source that either voters or election officials can rely on to determine the balance of outstanding LFOs. Barton Dep. 86:25-88:4; Earley Dep. 197:14-198:10 ("[T]here could be lots of instances where the clerk's office does not have complete information."); Brown 143:2-5; Matthews Dep. 184:14-20; Matthews 9/17/19 Email, Doc. 153-4 (testifying that records are often misplaced or destroyed by Clerks of Court ("Clerks"); some

[5] Court clerks also do not understand the meaning of SB7066. Communications between clerks demonstrate fundamental questions about SB7066's meaning. *See, e.g.*, 7/15/19 Minutes, Doc.167-96 (questions regarding application of SB7066 to interest, civil liens, and incarceration fees); *see also* 7/8/19 Minutes, Doc.167-76; 8/5/19 Minutes, Doc.167-67; 8/20/19 Minutes, Doc.167-66; 8/12/19 Minutes, Doc.167-64; Greenberg Traurig Mem., Doc. 167-50 (legal memo for raising substantial questions about SB7066 requirements, including whether LFOs imposed as civil liens at sentencing are covered).

counties maintain case records with police departments; and some Clerks will only provide the Department unofficial summaries rather than official case documents).[6] Indeed, neither Defendants nor Clerks record an individual's restitution obligation. Brown Dep. 143:6-21; Matthews Dep. 184:14-20; Barton Dep. 86:25-87:17, 108:7-25, 128:1-9; Earley Dep. 197:20-198:10; 8/23/19 Email, Doc. 167-86; 7/8/19 Minutes ("Restitution is a big problem."). The LFO information available to Defendants and voters is rarely disaggregated for each individual fine, fee, and cost assessed, and is of poor quality, inconsistent, and largely unhelpful. *See, e.g.*, Barton Dep. 107:23-108:1; Brown 143:2-5; Earley Dep. 199:24-200:13. Pls.' Br., Doc. 98-1, at 32-40.[7] All evidence to date suggests that complete, accurate, and reliable data on outstanding LFOs simply *does not exist.*

Because of these fundamental deficiencies, the Department is not currently implementing SB7066's LFO requirements or initiating removals for registrants with disqualifying LFOs. It has set no clear date for when it will be able to do so.

[6] The Department cannot access credible and reliable information on disqualifying LFOs. Matthews Dep. 175:5-11; BVRS Mem., Doc. 152-103, at 1; Brown Dep: 67:17-18, 123:7-9. Thus, it is currently not the case that "[w]here a registrant [is otherwise eligible,] the State does a further assessment about whether 'all terms of sentence,' including financial obligations, have been satisfied." Opp. 12.

[7] Accessing information about which LFOs are disqualifying and the balance for outstanding disqualifying LFOs is even more complicated for those with federal or out-of-state convictions. *See* Brown Dep. 144:25-145:5; 170:7-25; Matthews Dep. 55:19-56:16; 184:21-185:23; 186:23-187:14; 187:18-20; Earley Dep. 40:18-41:4; 41:25-42:4.

Dkt.152-131 Earley FSASE Notes (planning for LFO removal process "long term," after the fall of 2019).

The Department's response to *its own* uncertainty about SB7066's LFO requirements is to place the burden entirely on the voter to assess their own eligibility, under threat of prosecution. Matthews Dep. 190:21-25 ("Every voter is responsible of their own determination of whether they are eligible or not ... They are the ones that are having to swear under oath.").

Between January 8 and July 1, 2019, payment of LFOs was not a condition of rights restoration under Amendment 4. *See* Barton Dep. 48:22-49:12; Osceola Webpage, Doc.152-27; Osceola FAQ, Doc. 152-28; Notice, Doc. 152-133. In fact, many elections officials indicated that completion of parole and probation was the only requirement. *See* Pls.' Br. 22-23. As a result, many people, including most Plaintiffs, registered with the understanding they were eligible despite having outstanding LFOs registered. *See* Compl., Doc. 1 at ¶¶10-19; Barton Dep. 69:2-7. Now, under SB7066, if their disqualifying LFOs are not paid, these registered voters are ineligible to actually vote. Brown Dep. 120:18-23, 151:17-25.

Returning citizens must affirm their eligibility to vote when they register, Fla. Stat. §97.051, and risk criminal prosecution if they vote while ineligible, *id.* §104.011(1). *See* Brown 152:12-16 (testifying if returning citizens "are unsure" they should not register because "you are affirming that you know that you are

eligible."). Yet, the State provides no process for these individuals to obtain a determination of their eligibility. Placing eligible voters in such an impossible predicament is unlawful.

II. Defendants' Implementation of SB7066 Violates Procedural Due Process.

Returning citizens are entitled to due process both (1) before their right to register to vote is denied, and (2) once registered, to verify whether they are eligible to vote. *See, e.g.*, *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 102 (1963) ("[T]he requirements of ... due process must be met before a State can exclude a person from practicing law."); *Haitian Refugee Ctr. v. Nelson*, 872 F.2d 1555, 1562 (11th Cir. 1989) (finding an entitlement interest exists in the right to apply for Special Agricultural Worker status). Defendants' inability to implement SB7066 denies due process to both groups of returning citizens.

First, there is no process by which prospective applicants can seek a determination of eligibility under SB7066 from election officials charged with administering the election code. No state official will advise such applicants of their eligibility, *supra* §I. Applications submitted without affirmation of eligibility are rejected as incomplete. Matthews Dep. 215:13-15; Incomplete Procedure, Doc. 152-120 at 1-2 (denial letter for failing to check a felony rights restoration box on the registration form). The only recourse is to submit a completed form—the precise thing these individuals are unable to do. No process exists to challenge the

denial of an incomplete registration form. *Compare* Fla. Stat. §97.073 (denial of incomplete application) *with* Fla. Stat. §98.075(7) (removal hearing process).

Second, returning citizens who are currently registered, including most Individual Plaintiffs, are ineligible to vote if they have disqualifying LFOs under SB7066. Brown Dep. 120:18-23, 151:17-25. If they vote in reliance on their valid registration status, they risk criminal prosecution. Yet, there is no mechanism to enable these registrants to obtain a determination of their eligibility.

In opposition to Plaintiffs' procedural due process claim, Defendants' sole response is to invoke the statutory process to challenge removal from the voting rolls. Opp. 28. This process *is not available to either group* of returning citizens. Prospective applicants cannot invoke the removal process at all. And returning citizens who are already registered receive no process concerning their eligibility under Fla. Stat. §98.075 because Defendants are not notifying individuals whether they are ineligible due to outstanding LFOs. Defendants admit they do not know how to enforce these provisions of SB7066. Matthews Decl.[8]

[8] Whenever Defendants do initiate the statutory removal process for registrants with outstanding LFOs, that process will have a high risk of erroneous deprivation. Even the far simpler matter of identifying individuals that are ineligible because they are currently incarcerated for felony convictions has been rife with errors. *See* Brown Dep. 67:19-68:7; 9/9/19 Moore Email, Doc. 152-73 (Leon County SOE officers estimating that the Division of Elections' felon packets had a 36.4% error rate); Earley Dep. 175:22-176:13 ("[e]mphatically" agreeing that Secretary's removal procedures were "not off to a very accurate start"). The risk of error is

Defendants suggest that Plaintiffs and others that registered during the statutory safe harbor period are not harmed because Defendants are currently not removing voters from the rolls because of outstanding LFOs. That is incorrect. The right in question is the right to vote, not merely the right to remain on a voter registration list. Returning citizens who registered to vote cannot verify their eligibility under SB7066's LFO requirements and thus are injured in the same way as those who are not yet registered. These registrants risk prosecution if they try to vote. Earley Dep. 201:5-7 (testifying that only recourse for returning citizens unsure of eligibility to vote may be to "[g]et a good lawyer"). Defendants provide neither group with a process to determine their eligibility and enable them to cast a ballot without fear.

Finally, Defendants' argument that there is no deprivation of the right to vote because Plaintiffs' initial disenfranchisement was constitutional misunderstands the due process claim. Opp. 26. Article VI, Section 4 creates a constitutionally-protected liberty interest subject to due process protections because the law "contain[s] substantive limitations on official discretion, embodied in mandatory statutory ... language," *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009) (quotation marks omitted); s*ee also Barfield v. Brierton*,

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particularly high since the final arbiters are SOEs, who do not know what SB7066 requires. Arrington Dep. 23:13-16.

883 F.2d 923, 935 (11th Cir. 1989). Plaintiffs are denied due process before they are deprived of this interest.

III. Defendants' Inability to Implement SB7066 Illustrates Why Its LFO Requirements Are Void for Vagueness.

Defendants provide no response to Plaintiffs' void for vagueness claim beyond a footnote citing a single dissenting opinion from the Ninth Circuit. *See* Opp. 27 n.7. Meanwhile, discovery in this case only underscores the vagueness problems endemic to SB7066.

First, it is not only that the documents necessary to determine eligibility are unavailable to Plaintiffs, but that *Defendants themselves* do not know what SB7066 requires. *See supra* §I. The law is void for vagueness because of Defendants' inability to explain or identify: (a) which document is "the sentencing document" that identifies disqualifying LFOs; (b) which LFOs are disqualifying; (c) the bounds of the statute's limitation related to LFOs that accrue after sentencing; and (d) which LFOs for out-of-state or federal convictions are disqualifying. Moreover, Defendants' inability to point to any reliable sources providing a disaggregated figure for how much returning citizens owe on disqualifying LFOs, across different counties, states, and the federal system renders the law void for vagueness in practice as well. The only argument Defendants advance in opposition is that Plaintiffs should know what they owe. But that argument does nothing to address

the ambiguity in the text of SB7066 itself, and the deficiency of the state's administrative records. Matthews 9/17/19 Email, Doc. 153-4.

If Defendants themselves cannot answer basic questions about SB7066's LFO requirement, "the person of ordinary intelligence" cannot be expected to know what SB7066 requires. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also United States v. Dumas*, 94 F.3d 286, 291 n.3 (7th Cir. 1996) ("[T]he validity of a law with which it is impossible to comply may be questioned."). Indeed, this is the *majority* holding in the case cited by Defendants. *See United States v. Evans*, 883 F.3d 1154, 1162 (9th Cir. 2018) (holding condition of supervision unconstitutionally vague where the government "offered no suggestion as to what [the challenged term] might mean").

All of the factors that heighten void for vagueness concerns are present here. First, the law directly regulates voting, a First Amendment-protected activity. *See NAACP v. Button*, 371 U.S. 415, 432 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression."). The vague operation of SB7066 is unquestionably chilling the voting participation of eligible Floridians. *See* Earley Dep. 116:21-117:13 (testifying of "great hesitation" among returning citizens to register and vote "[b]ecause they don't believe that there's no risk of prosecution"); Barton Dep. 85:4-86:12; 88:7-20; 112:7-11; 118:2-14; 119:8-12; *See, e.g.*, Riddle Decl. ¶ 19; Wright Decl. ¶ 23, Doc. 98-10; Tyson Decl. ¶ 25. *See*

Grayned, 408 U.S. at 109 ("[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms.") (quotation marks omitted).

Second, the law is enforced with criminal penalties and "[w]here a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *see* Fla. Stat. §104.011(1)-(2); *LWV of Fla. v. Browning*, 863 F. Supp. 2d, 1155, 1160-61 (N.D. Fla. 2012) (statute that is "not well crafted" and "virtually unintelligible" "becomes void for vagueness" "especially [where it] regulates First Amendment rights and is accompanied by substantial penalties.").

Third, "[t]he prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991). SB7066's vagueness creates the risk of arbitrary or discriminatory enforcement. Indeed, the record shows that disparate enforcement is already occuring. *See* Matthews Dep. 183:4-8 (different counties use different formats for sentencing documents); *compare* Latimer Dep. at 52:2-53:3 (SOE does no additional research to confirm Secretary's ineligibility matches) *with* Earley Dep. 42:13-44:20, 128:12-129:3 (outlining SOE's extensive research process to confirm Secretary's ineligibility matches); 7/18/19 Emails, Doc. 167-92 (emails regarding differing county policies on

negotiating resolution of LFOs); 5/29/19 Email, Doc. 167-101 (same). The maze of uncertainty surrounding SB7066 makes attempting to vote as an *eligible* returning citizen fraught with risk and chills core First Amendment activity. If Defendants cannot explain SB7066, the ordinary person certainly cannot understand it.

IV. SB7066 Imposes Undue Burdens on the Voting Rights of Returning Citizens.

The absence of credible and reliable records for determining outstanding, disqualifying LFOs unduly burdens returning citizens' right to vote because they will be unable to determine their eligibility. Defendants contend that "*Anderson-Burdick* does not apply to felon re-enfranchisement because felons have no right to vote unless and until they satisfy all applicable requirements." Opp. 25. But this argument wholly disregards the fact that SB7066 imposes severe burdens on returning citizens *even if they have satisfied* "all applicable" LFO requirements, because they cannot verify that they have done so without expending tremendous time and effort to confirm eligibility. *See Ga. Coal. of People's Agenda v. Kemp*, 347 F. Supp. 3d 1251, 1264 (N.D. Ga. 2018) (requiring voter to conduct extensive research to verify his citizenship imposed severe burden because it went "beyond the merely inconvenient.") (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring)).

First, returning citizens must identify the absence of disqualifying LFOs, subject to the burdens described above. Defendants' contention that "individuals

convicted of the crime are in as good a position as anyone else to review the four-corners of their sentencing document and know how much of their financial obligations remain outstanding," Opp. 27, is provably false. Tyson Decl., Doc. 98-13 ¶¶4-17; Miller Decl., Doc. 98-12 ¶¶4-7, 13; Riddle Decl., Doc. 98-6 ¶16. A returning citizen must go to multiple clerks and agencies, and spend hours requesting court records, some of which do not exist or cannot be obtained. *See, e.g.*, Matthews 9/17/19 Email, Doc. 153-4. Then, they face the impossible task of determining which LFOs are disqualifying, *see supra* §I. And Defendants' policy—to leave returning citizens "on the hook" for determining their eligibility, without any guidance on the meaning of the law or access to reliable data—requires them to do what the Departments themselves cannot: verify with certainty that all disqualifying LFOs have been paid.

Even if Plaintiffs can confirm that they have disqualifying LFOs, SB7066 imposes severe and insurmountable burdens on their voting rights by requiring them to pay debt they cannot afford or face *de-facto* disenfranchisement. The sheer magnitude of disenfranchisement across Florida underlines the burden. There is no dispute that SB7066 purports to disqualify hundreds of thousands of returning citizens from registering and voting due to outstanding LFOs, relegating them to long term or lifelong disenfranchisement. A conservative estimate by Plaintiffs' expert of data from 58 counties indicates that 436,266 returning citizens in those

counties alone—80% of those otherwise eligible—have outstanding LFOs. Smith Suppl. Report, Doc. 153-1 at 4, Table 1. 62.7% of those with outstanding LFOs owe at least $500. *Id.* at 12, Table 3. Defendants offer no counter-estimate to Dr. Smith's cautious analysis.[9]

V. SB7066 Unconstitutionally Conditions Access to the Franchise on Plaintiffs' Financial Resources.

Independent from the indisputable confusion caused by Defendants' implementation of the law, SB7066 violates settled constitutional prohibitions against wealth-based voting restrictions. Defendants cannot evade controlling legal authority: "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966); *accord Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005). In defining "terms of sentence" broadly to include all forms of financial obligations regardless of inability to pay, Florida legislators inevitably collided with this clear constitutional prohibition.

[9] To the extent Defendants argue that *Anderson-Burdick* cannot apply until an individual's rights have been restored, the argument misses the mark. Plaintiffs' rights *have been restored*, most have registered, and many have already begun voting. SB7066 impermissibly purports to disenfranchise Plaintiffs *again*, based on past convictions for which their rights were restored. *See United States v. Tait*, 202 F.3d 1320, 1324-25 (11th Cir. 2000). *See infra* §V.B.

Defendants disregard this precedent entirely, along with the numerous Supreme Court cases cited in Plaintiffs' brief. Defendants insist that any financial condition on Plaintiffs' ability to vote is permissible because "felon disenfranchisement and any subsequent felon re-enfranchisement schemes are distinct from restrictions on the fundamental right to vote." Opp. 3. This argument lacks merit.

A. Controlling Authority Prohibits SB7066's LFO Requirements.

In *Johnson*, the Eleventh Circuit sitting *en banc* applied *Harper* in the *specific context* of rights restoration in Florida, stating directly that "[a]ccess to the franchise cannot be made to depend on an individual's financial resources." 405 F.3d at 1216 n.1. *Johnson* upheld Florida's clemency system explicitly because "access to *restoration of the franchise*" was *not* based on "ability to pay"—"felons who cannot afford to pay restitution" were allowed to waive the financial requirement. *Id*. (emphasis added). Thus, the Eleventh Circuit has already rejected Defendants' proposed distinction between voting rights and restoration of those rights. Defendants have no answer to this binding authority.[10]

[10] Plaintiffs note that the Eleventh Circuit's analysis of *Harper* is binding, not "mere *obiter dicta*," because that analysis was "necessary to th[e] result[.]" *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). *See Johnson*, 405 F.3d at 1217 n.1 (affirming judgment below "*[b]ecause* Florida does not deny access to the restoration of the franchise based on ability to pay" (emphasis added)).

Defendants repeat the mantra that "[f]elons forfeit their right to vote under Florida law" upon conviction. Opp at 3. But that is not relevant to whether fee requirements are permissible. The federal constitutional right Plaintiffs press here is the right *against discrimination based on financial resources* in access to the franchise. The Equal Protection Clause "restrains the States from fixing voter qualifications which invidiously discriminate." *Harper*, 383 U.S. at 667. It would be an incoherent doctrine for wealth-based voting restrictions to be utterly repugnant, "'invidious' discrimination," *id.* at 668, in general—but wholly permissible and unobjectionable when applied to returning citizens. Floridians were never obligated to approve Amendment 4. But having done so, Florida cannot exclude poor people from its reach.

B. The Constitutionality of SB7066 Does Not Turn on Whether Plaintiffs Have a "Fundamental" Right to Vote.

Defendants ironically claim that "[t]he statute now being challenged does not deny or abridge any rights; it only restores them." Opp. 21 (quotations omitted). Amendment 4—not SB7066—restored voting rights on January 8, 2019. In sharp contrast to every case cited by Defendants, hundreds of returning citizens, including many Individual Plaintiffs, lawfully registered before SB7066 went into effect and some have already voted. Florida officials, including the Secretary, never gave any indication they might be ineligible due to LFOs. *See, e.g.*, Compl. at 47 n.13 (state senator telling Plaintiff Leicht to "go register to vote" and that she

would not be prosecuted); Matthews 2/11/19 Email, Doc. 152-29; Matthews 6/7/19 Email, Doc. 152-30; Marconnet 6/18/19 Email, Doc. 152-31 (emails from Department to SOEs instructing them to implement Amendment 4 without delay and without reference to LFOs); Fla. Stat. §104.011(3) (safe harbor provision for returning citizens who registered or voted between January 8 and July 1, 2019). SB7066 now *disqualifies* these Plaintiffs despite their vested interest in voting. *See* Pls.' Br. 71-72. The rights of Floridians are not a switch that Defendants can flick on and off at will.

But even presuming Plaintiffs have no "fundamental" interest in voting, this would not diminish their likelihood of success on the merits. The Fourteenth Amendment prohibits States from punishing individuals or "invidiously den[ying] … a substantial benefit" based on inability to pay legal debt. *Bearden v. Georgia*, 461 U.S. 660, 665 (1983). *See* Pls.' Br. 52-57. This doctrine is expressly *not* limited to vindication of any "fundamental" right. In *Griffin v. Illinois*, the Supreme Court emphasized that there is no fundamental right to "appellate courts … or appellate review at all." 351 U.S. 12, 18 (1956). Nevertheless, if a State makes such review available, it cannot do so "in a way that discriminates against some convicted defendants on account of their poverty." *Id*. The same is true here. Regardless of a State's ability to disenfranchise convicted felons, once it makes

voter restoration available, it cannot do so "in a way that discriminates against some convicted defendants on account of their poverty." *Id*.

Bearden likewise held that it is unconstitutional to revoke probation due to inability to pay LFOs despite the fact that there is no fundamental right to probation. *Bearden* never makes reference to any "fundamental rights" analysis at all, instead directing courts to examine, *inter alia*, the "*nature of the individual interest* affected"—a factor which would be superfluous if it only applied to fundamental rights already subject to strict scrutiny. 461 U.S. at 666–67 (emphasis added); *see also* Pls.' Br. 54-55. Therefore, it makes no difference whether Plaintiffs' interest in voter restoration arises from a state-created mechanism versus some intrinsic "fundamental" right.[11]

Defendants principally rely on three cases: *Thompson v. Alabama*, 293 F. Supp. 3d 1313 (M.D. Ala. 2017); *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir.

[11] The Supreme Court has repeatedly rejected arguments that *Griffin*'s principle is confined to the facts of previously-decided cases. *See, e.g.*, *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971) (*Griffin* applies when there is no risk of incarceration); *M.L.B. v. S.L.J*, 519 U.S. 102, 127 (1996) (declining to "rigidly restrict *Griffin* to cases typed 'criminal'"). This does not mean that the principle extends to every form of wealth discrimination. But it does apply where individuals are punished for inability to pay legal debt or fees in domains where the State exercises overarching control, including the criminal justice system, *Griffin*, certain civil appeals, *M.L.B.*, public education, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1972) and access to the franchise, *Harper*.[12] Defendants' additional citations are of limited relevance because they (1) do not involve fee requirements for voter restoration, (2) are not federal cases, or (3) are unpublished decisions brought by *pro se* plaintiffs.

2010); and *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010).[12] *Thompson* provides little support to Defendants because the court rejected the State's argument that fee requirements for voter restoration systems are presumptively constitutional. 293 F. Supp. 3d at 1331-32. Likewise, in citing *Harvey*, Defendants omit a critical point: the ruling was expressly predicated on the fact that "no plaintiff alleges that he is indigent, so … we explicitly do not address challenges based on an individual's indigent status." 605 F.3d at 1079. The Ninth Circuit was left to presume that the plaintiffs could pay their LFOs and chose not to. Here, Individual Plaintiffs *have* testified that they cannot pay—a fact of central importance to the legal analysis. Indeed, *Harvey* noted that if the plaintiffs' allegations were different, then "withholding voting rights from those who are truly unable to pay" might not "pass th[e] rational basis test" applied by the court on the record before it. *Id.* at 1079-80. Like *Thompson*, *Harvey* provides little support to Defendants.

Bredesen's split decision does depart in material ways from *Harper*, *Johnson*, and Plaintiffs' other authority. *Bredesen*'s majority misunderstood the precedent it examined. *See* 624 F.3d at 754-80 (Moore, C.J., dissenting) (detailing numerous ways majority diverged from Supreme Court authority). It bears noting

[12] Defendants' additional citations are of limited relevance because they (1) do not involve fee requirements for voter restoration, (2) are not federal cases, or (3) are unpublished decisions brought by *pro se* plaintiffs.

that Tennessee's voter restoration scheme was significantly narrower than SB7066 in only requiring payment of restitution and child support, rather than all fines or fees owed to the State. *Id.* at 745. Regardless, *Johnson* and Supreme Court precedent control here—not *Bredesen*.

Recognizing SB7066's vulnerability given that precedent, Defendants seek to embellish the law's modification provisions, asserting that "[s]everal alternatives are provided for those who cannot pay the[ir] financial obligations[.]" Opp. 5. Not so. Nowhere does SB7066 contain the term "ability to pay" or require any such determination. *See* Fla. Stat. §98.0751(2)(a)(5). To the contrary, the statute vests not only courts but private parties with unreviewable discretion to require or terminate payment for any reason whatsoever. *Id.* §98.0751(2)(a)(5)(e)(II). That problem is compounded by the fact that counties and courts often contract with collections agencies, which can then negotiate LFO debt as they see fit. *See, e.g.*, PennCredit Letter, Doc. 167-35, PennCredit Guide, Doc. 167-36. Allowing private collections agencies to decide when a person is eligible to vote is one of the many irrational consequences of SB7066. Plaintiff Gruver testifies in his supplemental declaration that he previously contacted the court specifically to seek conversion of LFOs to community service and was advised that because that his debt was now held by a private company, "there was nothing the court could do." Gruver Supp. Decl. Doc. 152-23, ¶¶4-5, 7. And

Defendants have no response to the various deficiencies Plaintiffs identified, including that the alternatives cannot be invoked by individuals with out-of-state or federal debt. Pls.' Br. 24-25. The most that can be said of Defendants' purported alternatives is that it is *possible* that some courts, private individuals, and debt-collection agencies, might waive some LFOs while having no obligation to do so, and it is *possible* some petitioners may fall within the tiny percentage of LFOs in Florida that are converted to community service. *Id.* at 25-26. But hoping for such acts of grace is not an alternative for individuals who cannot pay.

Finally, Defendants claim that "words matter," Doc. 132 at 32, but ignore the plain text of the Twenty-Fourth Amendment, which flatly prohibits a "poll tax" or any "other tax." Defendants reflexively cite non-binding precedent for the proposition that LFOs are not taxes but debt that "Plaintiffs themselves incurred" without ever addressing the unique regime in Florida. Opp. 19. Unlike the law in *Bredesen*, SB7066 sweeps in all forms of fees. That is particularly notable since Florida has abolished general tax revenue to support its courts which instead rely exclusively on these very fees in order to operate. Pls.' Br. 28. Unlike restitution or child support, these fees do not arise from any unlawful conduct an individual "incurred;" they are imposed automatically as a result of the individual's (compelled) contact with the criminal justice system and go directly to the State rather than third-parties. Haughwout Decl., Doc. 152-20 ¶¶5-6. Furthermore, the

state has repeatedly suggested that its interest in requiring citizens to pay their fines and fees as a condition of rights restoration is not punitive, but rather that it serves as a debt collection incentive, including for the purpose of generating additional revenue for the state. *See, e.g.*, Opp. 7, 31; MTD Reply, Doc. 163 at 11-12. So while restitution alone might present a closer case, *see generally Bredesen*, 624 F.3d at 766-76 (Moore, C.J., dissenting), the payments required under SB7066 clearly encompass an ordinary understanding of a "tax."

C. SB7066 Cannot Withstand Even Rational Basis Review Because It Requires Payment Despite Inability to Pay.

Defendants' opposition underscores the undeniable irrationality of SB7066 as applied to returning citizens unable to pay their LFOs. The *sole* rationale that Defendants tentatively advance is an interest in requiring individuals to "complete[] the terms of their sentences, which includes payment of fines or restitution." Opp. 22 (quoting *Harvey*, 605 F.3d at 1079). But SB7066 cannot advance that rationale for those unable to pay—it is gratuitous punishment. *See Bearden*, 461 U.S. at 670 ("Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming."). And again, *Harvey* itself noted that on a different record with plaintiffs unable to pay—such as here—"withholding voting rights" might "not pass the rational basis test." 605 F.3d at 1080.

SB7066 does not further the State's interests, and therefore cannot justify the burden of *de-facto* disenfranchisement that SB7066 imposes on hundreds of thousands of returning citizens. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1322 (11th Cir. 2019) (taking into consideration "the extent to which [the state's] interests make it necessary to burden voting rights.") (quotations omitted)); *LWVF*, 863 F.Supp.2d at 1159-60 (evaluating the precise interests put forward by the State as justifications for the burden[.]").[13]

VI. The SOEs Are Proper Defendants.

In eight responses to Plaintiffs' motion, Defendant SOEs make the same argument: there is no need for an injunction against the SOEs because Plaintiffs seek an injunction against the Secretary or against SB7066 on its face. This Court already rejected that contention in denying SOEs Motion to Dismiss. The Court concluded that the rights Plaintiff assert in this case "would be enforced … through an injunction to the appropriate [SOE]." Aug. 15, 2019 Tr. of Sched. Conf., Doc. 110 at 8. Defendant SOEs are therefore "the appropriate person against whom an injunction can be entered to vindicate" Plaintiffs' claims, *id*.

[13] Defendants also recycle arguments over standing and abstention raised in their motion to dismiss, which Plaintiffs have already addressed. MTD Response, Doc. 121. Plaintiffs incorporate their arguments in response herein.

VII. Plaintiffs Have Clearly Established Irreparable Harm and the Balance of Equities Tips Decidedly in Their Favor.

There can be no serious dispute that blocking the Individual Plaintiffs and hundreds of thousands of other returning citizens from voting in upcoming elections constitutes irreparable harm sufficient for a preliminary injunction. Plaintiffs' seek straightforward relief: an injunction permitting them to register and/or vote without fear of criminal prosecution during the pendency of litigation. Inability to participate in an election is the classic example of irreparable harm because once an election has passed, "there can be no do-over and no redress." *LWV of Fla. v. Detzner*, 314 F. Supp. 3d 1205, 1223 (N.D. Fla. 2018) (quoting *LWV of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)); *Madera v. Detzner*, 325 F. Supp. 3d 1269, 1282 (N.D. Fla. 2018) (same). Such an injury cannot be subsequently reversed or compensated through damages.

Defendants offer no substantive argument to the contrary because there is none. State Defendants cursorily suggest—without citing authority—that Plaintiffs do not face any harm because their voting rights are "not triggered until felons are re-enfranchised." Opp. 30. That argument is entirely circular and simply regurgitates Defendants' contentions with regard to the merits. The point of evaluating harm independent from the merits is to determine whether it would irreparably injure Plaintiffs to block them from voting in upcoming elections Here, the prospect of irreparable harm is unmistakable. Plaintiffs and those similarly

situated cannot pay outstanding LFO debt and will lose the opportunity to vote in upcoming elections without intervention from this Court. Furthermore, as discussed *supra* §IV, the current regime will deny even those returning citizens who are in fact eligible under SB7066, because they are unable to determine their eligibility.

Similarly the balance of equities tips sharply in Plaintiffs' favor. The State does not have an interest in keeping a law they do not know how to implement in effect. Without court intervention, SB7066 will bar hundreds of thousands of Floridians from voting because of inability to pay, make it impossible for many eligible voters to ascertain their eligibility and vote, and—given the State's inability to conduct list maintenance under the law—leave an unknown (and likely growing) number of registered but ineligible voters on the rolls and at risk of prosecution. Only an injunction can prevent irreparable harm, avoid further chaos and confusion, and vindicate Plaintiffs constitutional rights.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request the Court grant their Motion for Preliminary Injunction.

Date: September 27, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

The undersigned certifies that this filing complies with the size, font, and formatting requirements of Local Rule 5.1(C). While at 6,351 words this filing exceeds the word limitations imposed through Local Rule 7.1(I) Plaintiffs have filed an Unopposed Motion to Exceed Word Limit.

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