No. 19-14551

In the United States Court of Appeals for the Eleventh Circuit

KELVIN LEON JONES, ET AL.,

Plaintiffs–Appellees,

v.

RON DESANTIS, ET AL.,

Defendants–Appellants.

BRIEF OF APPELLANTS

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
NO. 4:19-CV-300-RH-MJ

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115. Tyson, Clifford, *Plaintiff/Appellee*

116. Weiser, Wendy, *Attorney for Plaintiffs/Appellees*

117. White, Christina, *Defendant*

118. Wrench, Kristopher, *Plaintiff/Appellee*

119. Wright, Raquel, *Plaintiff/Appellee*

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated: December 13, 2019

s/ Charles J. Cooper
Charles J. Cooper
Counsel for Defendants-Appellants

STATEMENT REGARDING ORAL ARGUMENT

This appeal concerns an important question of constitutional dimension: whether the district court erred in preliminarily enjoining portions of a Florida constitutional amendment and implementing legislation extending the franchise only to felons who complete all aspects of their criminal sentence, including any fines, restitution, and other fees imposed as part of their sentences, as applied to such felons who cannot afford to pay. This Court's answer to that question will have far reaching effects, as it will determine whether the State must comply with the court's injunction in upcoming elections of national, state, and local significance in 2020. Appellants believe oral argument would assist the Court in deciding this consequential issue.

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INTRODUCTION

After nearly 200 years of strictly limiting felon voting, the People of Florida in 2018 amended their constitution to provide felons with the opportunity to regain eligibility to vote, but only after they had repaid their debt to society in full. After the adoption of this amendment, known as Amendment 4, the Florida Constitution now generally 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) (emphasis added). The Florida Legislature, exercising its plenary power to pass complimentary legislation, passed a statutory framework known as SB-7066, which interpreted "all terms" to include financial obligations such as restitution, fines, and fees imposed as part of a felon's sentence, and the district court agreed this interpretation closely mirrored the language and requirements of Amendment 4.

Each of the individual plaintiffs in this case is a convicted felon, and a convicted felon's eligibility to vote is not a matter of right, but is rather a matter of grace. *See Richardson v. Ramirez*, 418 U.S. 24 (1974); *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc). The People of Florida thus acted well within their authority to limit re-enfranchisement to felons who have fulfilled all terms of the punishment imposed upon them, including monetary ones. Felon re-enfranchisement is not an all-or-nothing question; governmental "reform may take

one step at a time," and judicial deference to policy choices has "added force" when the lawmaker "must necessarily engage in a process of line-drawing." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315, 316 (1993). And the choice made by the People of Florida is perhaps the *most* natural one, drawing a line between felons who have completed their sentences in full and those who have not. This choice not only communicates utmost respect for the law but also promotes interests in efficiency and administrability. For these reasons it is unsurprising that appellate courts have uniformly rejected challenges to laws requiring felons to complete the financial aspects of their sentences before voting, both generally and specifically as applied to those who cannot afford to pay. *See Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010) (O'Connor, J.) (generally); *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010) (as applied); *Madison v. State*, 163 P.3d 757 (Wash. 2007) (en banc) (as applied).

The district court nevertheless concluded that Plaintiffs are likely to succeed on their claim that requiring felons to pay their outstanding criminal restitution, fines, and fees before voting violates the Equal Protection Clause as applied to felons who cannot afford to pay. But the district court's decision is manifestly erroneous. Indeed, the district court based its decision primarily on the conclusion that a footnote in this Court's en banc decision in *Johnson* was "binding, controlling" authority mandating a ruling in Plaintiffs' favor. *See* App. 506 (Doc. 207 at 29). But the district court *entirely ignored* the key statement in the footnote: that this Court

was "*say*[*ing*] *nothing about whether conditioning an application for clemency on paying restitution would be an invalid poll tax.*" *Johnson*, 405 F.3d at 1216–17 n.1 (emphasis added). *Johnson* thus expressly *left open* the very issue the district court erroneously claimed had been decided in favor of Plaintiffs. Indeed, the *Johnson* footnote cuts sharply *against* Plaintiffs because it holds that claims like Plaintiffs' must fail when "the right to vote can still be granted to felons who cannot afford to pay," *id*., and Florida offers many such felons clemency, the conversion of financial penalties to community service, and forgiveness of outstanding obligations as potential avenues for enfranchisement.

Apart from *Johnson*, the district court relied on inapposite Supreme Court decisions that, unlike this case, involved individuals whose fundamental right to vote had never been forfeited, *see, e.g.*, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966), or that, also unlike this case, involved laws calling for *jailing people* for failing to pay fines they could not afford to pay, *see, e.g.*, *Bearden v. Georgia*, 461 U.S. 660 (1983).

For these reasons, the district court clearly erred in finding that Plaintiffs are likely to succeed on their equal-protection claim. And while Plaintiffs may raise the Twenty-Fourth Amendment as an alternative basis for affirmance, that claim fares no better. The criminal restitution, fines, and fees that Plaintiffs have not paid are

not any type of tax on the right to vote; they are aspects of punishment for their crimes that they have not fulfilled.

Because Plaintiffs are unlikely to succeed on the merits, it necessarily follows that they are not threatened with irreparable harm and that the public's interest does not favor enjoining Amendment 4 or SB-7066. To the contrary, the State is the party threatened with irreparable harm, as the district court's injunction at once contravenes the judgment of the People of Florida about what should be required of felons to be allowed to vote and re-enfranchises felons who are ineligible to vote under Florida's Constitution. Indeed, to the extent SB-7066 and Amendment 4 are held to be constitutionally infirm (which is not what the Governor or Secretary are arguing), the proper remedy under state-law severability principles would be to enjoin them entirely to return to the status quo ante of felon ineligibility for the franchise, not to selectively expand the scope of re-enfranchisement approved by the People of Florida.

For these reasons, it is imperative that this Court swiftly reverse the district court's erroneous order.

JURISDICTIONAL STATEMENT

Pursuant to Federal Rule of Appellate Procedure 28(a)(4) and Circuit Rule 28-1(g), Appellants attest that: (1) the district court has subject-matter jurisdiction over Plaintiffs' complaint under 28 U.S.C. §§ 1331 and 1367(a); (2) this Court has

subject-matter jurisdiction over the district court's interlocutory order under 28 U.S.C. § 1292(a)(1); and (3) the district court entered its preliminary injunction order on October 18, 2019 and Appellants timely filed their notice of appeal on November 15, 2019.

STATEMENT OF THE ISSUES

Whether the district court erred in preliminarily enjoining the portions of Senate Bill 7066 ("SB-7066"), which are complimentary in implementing the Voting Restoration Amendment ("Amendment 4"), that require convicted felons to pay any outstanding fines, restitution, and other fees imposed as part of their sentences before restoring their right to vote, as applied to such felons who cannot afford to pay.

STATEMENT OF THE CASE

I. Factual Background

Florida's first constitution, adopted in 1838 while Florida was still a territory, empowered the territorial Legislature to "exclude from . . . the right of suffrage, all persons convicted of bribery, perjury, or other infamous crime." FLA. CONST. art. VI, § 4 (1838). When Florida was admitted to the Union only a few years later, its General Assembly enacted such a law. *See* 1845 Fla. Laws ch. 38, art. 2, § 3, https://bit.ly/34eeO3k (mandating that "no person who shall hereafter be convicted of bribery, perjury, or other infamous crime, shall be entitled to the right of

suffrage"). This general policy persisted for nearly two hundred years. As of late-2018, Florida's constitution maintained that "[n]o person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights or removal of disability." FLA. CONST. art. VI, § 4 (2018).

But Florida, like many States, allows its citizens to propose changes to the State's constitution through an initiative process. *See* FLA. CONST. art. XI, § 3. Any amendments proposed via the initiative process become part of Florida's constitution if at least sixty percent of the voters on the measure support it. *Id.* § 5(e). And in 2016, the organization Floridians for a Fair Democracy, Inc. sponsored such a ballot initiative called the "Voter Restoration Amendment." *See Advisory Op. to the Att'y Gen. Re: Voting Restoration Amendment*, 215 So. 3d 1202, 1204 (Fla. 2017). The proposed amendment would have changed Article VI, section 4 of the Florida Constitution as follows (with new sections underlined):

> (a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. Except as provided in subsection (b) of this section, 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.
>
> (b) No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.

FLA. CONST. art. VI, § 4 (2019).

On October 4, 2016, the Attorney General for the State of Florida requested an advisory opinion from the Supreme Court of Florida, *see* FLA. CONST. art. IV, § 10, on whether the initiative petition satisfied the State's "single-subject" requirement under article XI, section 3 of the Florida Constitution, and whether its title and summary provided sufficient clarity under FLA. STAT. § 101.161. *See Advisory Op.*, 215 So. 3d at 1204–05.

During oral argument before the Florida Supreme Court, the sponsor's attorney addressed the meaning of the Amendment's requirement that felons complete "all terms of sentence" to restore their right to vote. He asserted that the phrase "all terms of sentence" meant "anything the judge puts into a sentence." App. 435–36 (Doc. 148-1 at 6–7). When asked specifically whether the terms of a sentence "include the full payment of any fines" or "restitution when it was ordered to the victim . . . as part of the sentence," the sponsor's attorney answered affirmatively. App. 443–44 (Doc. 148-1 at 16–17). The League of Women Voters (a Plaintiff here) and the American Civil Liberties Union of Florida (counsel for some of the Plaintiffs here) shared this understanding of Amendment 4. In a December 2018 letter to the Secretary of State they stated that Amendment 4's "phrase 'completion of all terms of sentence' includes . . . financial obligations imposed as part of an individual's sentence" which "may include restitution and fines." Ex. 1 to

Fla. Governor and Fla. Sec'y of State's Joint Mot. To Dismiss, Doc. 97-1 at 3 (Aug. 2, 2019), https://bit.ly/2PGZQxx.

The Supreme Court of Florida ultimately held that the proposed amendment met the State's legal requirements and approved the amendment for placement on the ballot. *Advisory Op.*, 215 So. 3d at 1209. And appearing on the ballot during the November 2018 election, the Voter Restoration Amendment—which eventually came to be known as "Amendment 4" because of its placement in the order of proposed amendments—received 64.55% of the vote and became effective on January 8, 2019.

Following Amendment 4's adoption, the State Legislature enacted Senate Bill 7066 ("SB-7066") on May 3, 2019 and Governor Ron DeSantis approved the statute on June 28, 2019. *See* 2019-162 Fla. Laws 1. SB-7066 provides that "completion of all terms of sentence" in Amendment 4 means, consistent with the plain meaning of the text and the sponsor's previous answers to the Florida Supreme Court, "any portion of a sentence that is contained in the four corners of the sentencing document, including, but not limited to" "[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." *Id.* at 28 (codified at FLA. STAT. § 98.0751(2)(b) (2019)).

SB-7066 also provides that the financial obligations enumerated above "are considered completed" in one of three manners: (1) "[a]ctual payment of the obligation in full"; (2) "the termination by the court of any financial obligation to a payee," upon the payee's approval; or (3) completion of community service hours "if the court . . . converts the financial obligation to community service." *Id*. at 29 (codified at FLA. STAT. § 98.0751(2)(a) (2019)). SB-7066 specifies that its requirements to pay financial obligations are "not deemed completed upon conversion to a civil lien." *Id.*

On June 15, 2019 one of the Plaintiffs here, Luis Mendez, filed a complaint in the district court, alleging in part that SB-7066 violates Amendment 4 by allegedly adding the requirement that a felon must pay any outstanding financial obligations imposed as part of his sentence before restoring his right to vote. On August 9, 2019, Governor DeSantis exercised his authority under article IV, section 1(c) of the Florida Constitution to request the Florida Supreme Court's opinion on "whether 'completion of all terms of sentence' under [Amendment 4] includes the satisfaction of all legal financial obligations—namely fees, fines and restitution ordered by the court as part of a felony sentence that would otherwise render a convicted felon ineligible to vote." Request for Advisory Op. from the Governor at 4, *In re Advisory*

Opinion to the Governor Re: Implementation of Amendment 4, No. SC19-1341 (Fla. Aug. 9, 2019). And on August 29 the Florida Supreme Court decided to exercise its discretion to provide an opinion in response to the Governor's request. The Court held oral argument on November 6 and its advisory opinion is pending.

II. Prior Proceedings

Plaintiffs, seventeen individuals and three organizations,[1] initially filed five separate suits against either or both Governor DeSantis and Secretary of State Laurel M. Lee ("Appellants") in their official capacities for declaratory and injunctive relief, alleging that SB-7066's conditioning of re-enfranchisement on the payment of legal financial obligations violated the United States Constitution, both generally and whenever the felon is unable to pay.[2] Plaintiffs invoked several

[1] The individual Plaintiffs are: Jeff Gruver, Lee Hoffman, Keith Ivey, Kelvin Jones, Karen Leicht, Rosemary McCoy, Luis Mendez, Jermaine Miller, Emory Mitchell, Stephen Phalen, Bonnie Raysor, Betty Riddle, Diane Sherrill, Sheila Singleton, Clifford Tyson, Kristopher Wrench, and Raquel Wright. The organizational Plaintiffs are the Florida State Conference of the NAACP, the Orange County Branch of the NAACP, and the League of Women Voters of Florida. This action is a consolidation of five suits that were initially filed separately. Based on the captions of those initial suits, the different sets of Plaintiffs are sometimes referred to in the record as the "Gruver Plaintiffs" (Gruver, Ivey, Leicht, Miller, Mitchell, Phalen, Riddle, Tyson, Wrench, Wright, and the three organizational plaintiffs); the "McCoy Plaintiffs" (McCoy and Singleton); and the "Raysor Plaintiffs" (Hoffman, Raysor, and Sherrill). Jones and Mendez filed individual complaints.

[2] Plaintiffs also named as defendants the Supervisors of Elections in counties where all but two of the individual Plaintiffs resided, and the Supervisor of Elections of Orange County, where one of the organizational plaintiffs is based.

constitutional provisions, including the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and the Twenty-Fourth Amendment. They also moved for a preliminary injunction to enjoin enforcement of the provisions of SB-7066 that require the payment of financial obligations for restoration of the right to vote pending resolution of their claims on the merits. Appellants, meanwhile, moved to dismiss Plaintiffs' suit for lack of Article III standing or to abstain.

On October 18, 2019 the district court denied Appellants' motion to dismiss or abstain and granted Plaintiffs' motion for a preliminary injunction in part. The Court held that the Plaintiffs had Article III standing because their injuries were redressable and that abstention would be inappropriate. In ruling on the State's abstention claim, the district court concluded that although "[a] decision by the Florida Supreme Court that Amendment 4 does not require payment of financial obligations as a condition of restoring voting rights would moot the constitutional questions presented in this case," App. 486 (Doc. 207 at 9), it could "predict[] with substantial confidence" that the Florida Supreme Court would hold that Amendment 4 required such payments, App. 488 (Doc. 207 at 11).

Turning to the merits, the Court held that Plaintiffs were unlikely to succeed on their procedural due process and unconstitutional vagueness arguments and withheld judgment on the Plaintiffs' Twenty-Fourth Amendment arguments. *See*

App. 517–27 (*id.* at 40–50). The district court did conclude that criminal fines and restitution payable to private victims of crime "plainly are not taxes" covered by the Twenty-Fourth Amendment. App. 519 (*Id.* at 42).

The district court also held, however, based on footnote 1 of this Court's en banc decision in *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005), that under the Equal Protection Clause the restoration of a felon's right to vote could not be made to depend on ability to pay financial obligations that were part of the felon's sentence. While the district court concluded that "it is clear that a state can deny restoration of a felon's right to vote based on failure to pay financial obligations included in a sentence," App. 504 (Doc. 207 at 27), it could *not* require felons to pay those obligations if the felons did not have the financial resources to do so. Concluding that Plaintiffs were likely to succeed on the merits of their equal-protection claim under *Johnson*, the Court preliminarily enjoined the Secretary "from interfering with an appropriate procedure through which the plaintiffs can attempt to establish genuine inability to pay." App. 527 (Doc. 207 at 50).

Before the district court issued its preliminary injunction, the Raysor Plaintiffs moved for the Court to certify the case as a class action under Federal Rule of Civil Procedure 23(a) and (b)(2). *See* App. 457 (Doc. 172). Specifically, the Raysor Plaintiffs sought to represent a class for Count 2 of their amended complaint, which

alleged that the challenged provisions of SB-7066 violated the Twenty-Fourth Amendment. That proposed class would encompass all persons otherwise eligible to register to vote in Florida but for outstanding financial obligations that they had to pay under SB-7066. *See* App. 463 (Doc. 172-1 at 3). They also sought to represent a subclass under Count 1 of their complaint, which raised a wealth-discrimination claim under the Equal Protection Clause. That subclass would be defined as all persons otherwise eligible to register to vote in Florida but for their inability to pay their outstanding financial obligations under SB-7066. *See* App. 463–64 (Doc. 172-1 at 3–4).

Appellants opposed the motion for class certification, arguing that the Raysor Plaintiffs' class under Count 2 was unnecessary because the Court did not rule in favor of Plaintiffs' Twenty-Fourth Amendment claim in its preliminary injunction order. *See* App. 567–69 (Doc. 220). Appellants also argued that the subclass falling under the Raysor Plaintiffs' wealth-discrimination claim would require individualized determinations of at least 430,000 former felons' personal financial situations and that such determinations of the class members' "inability to pay" would not be guided by sufficiently objective criteria. *See* App. 569–70 (*Id.*).

On November 15, 2019 the State Defendants timely filed their notice of appeal with respect to the district court's entry of the preliminary injunction. *See* App. 564 (Doc. 219).

On November 22, 2019 the district court set a hearing for December 3, 2019 on all pending motions and further noted that "the parties should be prepared to address," among other things, "whether the preliminary injunction should be extended to others (including class members, if a class is certified)." App. 589 (Doc. 228 at 2). The district court held the hearing as scheduled but has yet to rule on class certification or extension of the preliminary injunction to any class.

On November 27, 2019 Appellants moved in the district court for a stay of the preliminary injunction pending appeal in this Court. As of this filing, the district court has yet to rule on Appellants' stay motion. Should the district court deny the motion, Appellants intend to seek a stay from this Court.

III. Standard of Review

A district court may grant a preliminary injunction "only if the movant establishes that (1) he has a substantial likelihood of success on the merits, (2) he will suffer irreparable injury unless the injunction issues, (3) the injunction would not substantially harm the other litigant, and (4) if issued, the injunction would not be adverse to the public interest." *Long v. Sec'y, Dep't of Corr.*, 924 F.3d 1171, 1176 (11th Cir.), *cert. denied sub nom. Long v. Inch*, 139 S. Ct. 2635 (2019). And because a preliminary injunction is "an extraordinary and drastic remedy," it is not to be granted "unless the movant clearly establishes the burden of persuasion as to the four requisites." *All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc.*, 887 F.2d

1535, 1537 (11th Cir. 1989) (quotation marks omitted). Moreover, "[f]ailure to show any of the four factors is fatal, and the most common failure is not showing a substantial likelihood of success on the merits." *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009). Indeed, when a plaintiff has not shown a substantial likelihood of success on the merits, this Court need not even consider the remaining factors. *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1329 (11th Cir. 2015).

"A district court's grant of a preliminary injunction is reviewed for abuse of discretion." *Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres, More or Less, Over Parcel(s) of Land of Approximately 1.21 Acres, More or Less, Situated in Land Lot 1049*, 910 F.3d 1130, 1163 (11th Cir. 2018), *cert. denied sub nom. Goldenberg v. Transcon. Gas Pipe Line Co., LLC*, 139 S. Ct. 1634 (2019). However, the district court's legal conclusions are reviewed de novo. *Id*.

SUMMARY OF ARGUMENT

The district court abused its discretion by preliminarily enjoining Amendment 4 and SB-7066. Indeed, all four of the preliminary injunction factors tilt decisively in favor of Appellants.

First and foremost, Plaintiffs are unlikely to succeed on the merits of any of their equal-protection and Twenty-Fourth Amendment claims. Although the district court reasoned that SB-7066 violated the Equal Protection Clause by discriminating

on the basis of wealth, that conclusion cannot withstand scrutiny. The district court's analysis turned primarily on its interpretation of a footnote in this Court's decision in *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc). The district court read that footnote as binding authority that a restoration-of-voting-rights regime is unconstitutional if it conditions restoration on payment of financial obligations a felon is unable to pay. In reality, however, the footnote in *Johnson* expressly withheld judgment on that very question. And it made clear that a claim like Plaintiffs' must fail where at least one avenue for enfranchisement remains open for felons who cannot afford to pay their legal obligations. Here, Florida offers several potential avenues for many such felons. The district court's blatant misreading of *Johnson* cannot justify its equal-protection analysis.

The district court further compounded its legal errors by misinterpreting several Supreme Court precedents to stand for the principle that felon re-enfranchisement schemes should not be reviewed under the deferential standard of rational-basis review. But none of the precedents cited by the district court supports such a principle, which would contradict settled equal-protection principles. Rather, rational-basis review is the correct standard for scrutinizing felon re-enfranchisement laws, and Amendment 4 and SB-7066 are both easily justified by the State's interest in promoting the rule of law, reducing administrative costs, and ensuring that the voter registration system operates efficiently.

As for Plaintiffs' Twenty-Fourth Amendment claim, Plaintiffs do not have a cognizable injury because they lost their constitutional voting rights through their felony convictions. Simply put, Amendment 4 and SB-7066 cannot abridge a right that Plaintiffs do not have. Even if the Twenty-Fourth Amendment did apply, the requirement that felons complete the financial obligations imposed with their criminal sentences does not constitute an unconstitutional tax. The State can affix qualifications for re-enfranchisement based on the completion of all terms of a criminal sentence. While the district court expressed concern that court fees are "other taxes" that raise revenue for the government, Plaintiffs concede that such obligations are imposed as part of their criminal sentences. SB-7066 does not change the obligations incurred in felons' criminal sentences to unconstitutional taxes under the Twenty-Fourth Amendment.

Moreover, even if Plaintiffs could somehow show a substantial likelihood of succeeding on the merits of either their equal-protection or Twenty-Fourth Amendment claims, they have made no showing that they are likely to prevail in restoring their voting rights. If Plaintiffs and the district court are correct, then Amendment 4's condition that all felons intending to restore their voting right must complete "all terms of sentence," including fines and restitution, cannot be applied constitutionally to any felon unable to pay those outstanding obligations. While the Governor and the Secretary do not believe SB-7066 or Amendment 4 violate the

Constitution, if that were true, the appropriate remedy under Florida's severability principles would not be to selectively enjoin that condition. Rather, because the condition of completing "all terms of sentence" was an essential limitation on the restoration of felon voting rights adopted by the People of Florida, severability principles support invalidating Amendment 4 in its entirety. Any other result would thwart the intended effect of Amendment 4 and expand the reach of felon re-enfranchisement beyond what Florida voters intended.

Finally, although the Court need not consider the remaining three preliminary injunction factors, each favors reversing the district court's order. Plaintiffs cannot establish irreparable harm because they are not constitutionally entitled to the right to vote. Conversely, the State will suffer substantial harm from complying with the district court's order: it has a strong interest in enforcing valid laws and avoiding uncertainty in the electoral process. The public interest also favors reversing the injunction to avoid confusion and doubt in election requirements and outcomes.

ARGUMENT

I. Plaintiffs Cannot Show a Substantial Likelihood of Success on the Merits of Their Constitutional Claims.

A. Wealth-discrimination challenges to felon re-enfranchisement laws are subject to rational-basis review and both Amendment 4 and SB-7066 withstand scrutiny under that deferential standard.

1. *Johnson v. Governor of Florida* does not decide this case for Plaintiffs.

It is well settled that "[a] state's decision to permanently disenfranchise convicted felons does not, in itself, constitute an Equal Protection violation." *Johnson v. Governor of Florida*, 405 F.3d 1214, 1217 (11th Cir. 2005) (citing *Richardson v. Ramirez*, 418 U.S. 24, 53–55 (1974)). And as even the district court recognized in its order, it is equally "clear that a state can deny restoration of a felon's right to vote based on failure to pay financial obligations included in a sentence." App. 504 (Doc. 207 at 27). The only remaining dispute is whether a state that conditions restoration of suffrage on the completion of a felon's sentence, including any financial obligations, can constitutionally apply that condition to those who are unable to pay the obligations.

The district court maintained that this Court's en banc decision in *Johnson* was dispositive of that question. But that is patently erroneous. The footnote of *Johnson* on which the district court relied reads, in relevant part:

> The plaintiffs also allege that Florida's voting rights restoration scheme violates constitutional and statutory prohibitions against poll taxes. Access to the franchise cannot be made to depend on an individual's financial resources. *See Harper v. Va. State Bd. of Elections,* 383 U.S. 663, 668, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). Under Florida's Rules of Executive Clemency, however, the right to vote can still be granted to felons who cannot afford to pay restitution. The requirement of a hearing is insufficient to support the plaintiffs' claim. Because Florida does not deny access to the restoration of the franchise based on ability to pay, we affirm the district court's grant of summary judgment in favor of the defendants on these claims. *In doing so, we say nothing about whether conditioning an application for clemency on paying restitution would be an invalid poll tax.*

Johnson, 405 F.3d at 1216–17 n.1 (emphasis added).

The district court never acknowledged, cited, or quoted the final sentence of the *Johnson* footnote *expressly withholding judgment on the issue in question*. If a State could condition an application for clemency on paying any outstanding restitution, and if that application for clemency were necessary to restore one's voting rights (as was the case before Amendment 4), then restoration of the right to vote would be conditioned on paying restitution. And the *Johnson* court said "*nothing*" on whether that sort of conditioning would be an invalid poll tax. It did not say whether it would be constitutional generally. And it did not say whether it would be constitutional as applied to those who lacked the ability to pay. Put simply, by expressly declining to say anything on that issue, the *Johnson* court left open the question presented in this case.

2. Wealth discrimination claims against felon re-enfranchisement laws are subject to rational-basis review.

In addition to relying on the *Johnson* footnote, the district court further maintained that its interpretation of the footnote was "consistent with a series of Supreme Court decisions." App. 509 (Doc. 207 at 32). Although its reasoning is not particularly clear, the district court apparently thought its reading of the *Johnson* footnote was buttressed by Supreme Court precedents that purportedly show that courts must use heightened scrutiny in reviewing laws restoring felons' voting rights. But examination of the cases cited by the district court shows that the court erred.

First, the district court seemed to conclude that rational-basis review of SB-7066 and Amendment 4 would conflict with the Supreme Court's decision in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). *See* App. 509 (Doc. 207 at 32). There, the Supreme Court reaffirmed that fee requirements are ordinarily reviewed only for rationality because "States are not forced by the Constitution to adjust all tolls to account for 'disparity in material circumstances.'" *M.L.B.*, 519 U.S. at 123–24 (quoting *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring in judgment)). But the Supreme Court also noted that its cases "solidly establish two exceptions to that general rule." *Id.* at 124. One exception that the Court mentioned in dicta is that "[t]he basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license." *Id.*

But that exception does not apply to this case. That is because although the "basic right to participate in political processes" may generally be a fundamental right under the Equal Protection Clause, *see Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017), it is not a fundamental right for those convicted of a felony. As Justice O'Connor explained while sitting by designation on the Ninth Circuit, felons challenging a scheme for restoring their voting rights "cannot complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted under the terms of" the Supreme Court's decision in *Richardson v. Ramirez*. *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010). Rather, such felons "are really complaining about . . . the denial of [a] statutory benefit of re-enfranchisement that [the State] confers upon certain felons." *Id.* And "[t]his is not a fundamental right; it is a mere benefit that . . . [the State] can choose to withhold entirely."[3] *Id.*; *see also Madison v. State*, 163 P.3d 757, 768

[3] This analysis also explains why the Supreme Court's decision in *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966), cannot justify the district court's order. In *Harper*, the Supreme Court held that Virginia's poll tax violated the Equal Protection Clause. The Court reiterated the longstanding principle that voting was a "fundamental political right," *id.* at 667 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)), and invalidated Virginia's poll tax because "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax," *id.* at 666. Indeed, because such poll taxes infringe on a fundamental right, they are invalid *regardless of whether the affected voter has the means to pay*. *See id.* at 668 ("We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it."). Amendment 4 and SB-7066 clearly do not implicate the fundamental right to vote because, as the district court itself recognized, "it is clear that a state can deny restoration of a felon's right

(Wash. 2007) (en banc) ("[T]he right to vote is not fundamental for convicted felons.").

A statutory benefit only runs afoul of equal protection if it "confers rights in a discriminatory manner or distinguishes between groups in a manner that is not rationally related to a legitimate state interest," *Harvey*, 605 F.3d at 1079, and, as explained below, Amendment 4 and SB-7066 easily satisfy that standard. *See infra* Part I.A.3. Because *M.L.B.* spoke only of cases in which the payment of some fee affected the exercise of an existing fundamental right to vote, it has no purchase where, as here, Plaintiffs are challenging not the loss of a fundamental right but the State's selective extension of a statutory benefit.

The district court also invoked a second exception to the traditional application of rational-basis review to wealth-discrimination claims: the exception for "claims related to criminal or quasi-criminal processes." App. 509 (Doc. 207 at 32). In particular, the district court cited *Bearden v. Georgia*, 461 U.S. 660 (1983), in support of its invocation of this second exception to rational-basis review. *See* App. 509 (Doc. 207 at 32). But *Bearden* is inapposite. There, the Supreme Court considered whether a sentencing court could "revoke a defendant's probation for

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to vote based on failure to pay financial obligations included in a sentence." App. 504 (Doc. 207 at 27); *see also Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.). That the State can constitutionally require *even some* felons to pay their outstanding legal financial obligations to restore their rights to vote shows that *Harper* is inapplicable.

failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate." *Bearden,* 461 U.S. at 665. Interpreting a long line of relevant cases, the Court distilled a basic principle: "[I]f the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter *imprison* a person solely because he lacked the resources to pay it." *Id.* at 667–68 (emphasis added). As this Court has recently explained, *Bearden* only held that "it violates equal protection principles to *incarcerate* a person 'solely because he lacked the resources to pay' a fine or restitution." *United States v. Plate*, 839 F.3d 950, 956 (11th Cir. 2016) (emphasis added) (quoting *Bearden*, 461 U.S. at 668); *see also Williams v. Illinois*, 399 U.S. 235, 244 (1970) ("We hold *only* that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on *imprisonment* for any substantive offense be the same for all defendants irrespective of their economic status." (emphases added)).

Bearden's holding—that States may not *imprison* individuals only because they cannot afford to pay fines or restitution—simply does not apply here. That is because the individual's inability to pay a fine or restitution in *Bearden* implicated a fundamental right—the right to be free from physical restraint and punishment. *See Ingraham v. Wright*, 430 U.S. 651, 673–74 (1977); *see also Plate*, 839 F.3d at 955 (applying *Bearden* to a defendant's claim that "the district court violated her

constitutional rights by conditioning her *liberty* on her ability to pay restitution in full" (emphasis added)). Plaintiffs here do not have a fundamental right to have their right to vote restored. *See Johnson v. Bredesen*, 624 F.3d 742, 748–49 (6th Cir. 2010) (contrasting re-enfranchisement conditions, which "merely relate to the restoration of a civil right to which Plaintiffs have no legal claim," with the revocation of probation in *Bearden* that "implicated physical liberty").

Moreover, the *Bearden* court made clear the limited nature of its ruling regarding incarceration by noting that the State "of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws" and that "[a] defendant's poverty in no way immunizes him from punishment." *Bearden*, 461 U.S. at 669. Given the unique effect of incarceration on the fundamental right to physical liberty, *Bearden*'s holding has no purchase here.

For these reasons, neither of the district court's two asserted exceptions to rational-basis review for wealth-discrimination claims applies.

Finally, rational-basis review is also the strictest appropriate standard for scrutinizing Amendment 4 and SB-7066 because the laws do not on their face discriminate on the basis of wealth, and there is no basis for concluding that they were enacted " 'because of,' not merely 'in spite of,' " any purported "adverse effects" upon felons unable to complete the financial aspects of their sentences. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). The Supreme Court

has upheld laws under rational-basis review even where "the principal impact of [the law] falls on the indigent," *Harris v. McRae*, 448 U.S. 297, 323 (1980), so long as the law does not target the poor in the exercise of their fundamental rights, *see also Maher v. Roe*, 432 U.S. 464, 470–71 (1977). While the Court has not invoked this purposeful-discrimination requirement in cases like *Bearden*, that involve imprisonment, *see M.L.B.*, 519 U.S. at 126–27, that line of cases is inapplicable for the reasons described above.[4] Because the district court concluded that Amendment 4 and SB-7066 have at most a disparate impact on those felons unable to pay their legal financial obligations, it at most should have assessed only whether SB-7066 had a rational basis for applying Amendment 4's payment requirement to all felons, regardless of ability to pay.

Indeed, without a showing of purposeful discrimination the equal-protection claim fails at the outset, as "proof of discriminatory intent or purpose is a necessary prerequisite to any Equal Protection Clause claim." *Parks v. City of Warner Robins*, 43 F.3d 609, 616 (11th Cir. 1995). The "conclusion" that Amendment 4 and SB-7066 were not enacted with the purpose of discriminating on the basis of wealth

[4] If this Court ultimately concludes that the present litigation cannot be distinguished from the *Bearden* line of cases, Appellants preserve the argument that those cases are inconsistent with fundamental equal-protection principles explicated in *Washington v. Davis*, 426 U.S. 229 (1976), and should be overruled. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 133–39 (1996) (Thomas, J., dissenting).

therefore "ends the constitutional inquiry." *Vill. of Arlington Heights v. Metro. Hous. Dev. Co.*, 429 U.S. 252, 271 (1977).

It is in fact the district court's injunction, not Florida law, that implicates the Equal Protection Clause by drawing a wealth classification. Under Florida law, all felons are treated equally regardless of wealth—they must complete all components of their sentence, including the financial components, before becoming eligible to vote. The district court's injunction, by contrast, "amount[s] to inverse discrimination" by extending only to felons who cannot afford to pay their financial obligations the opportunity to obtain access to the franchise without completing all terms of their sentences. *See Williams*, 399 U.S. at 244.

3. Amendment 4's and SB-7066's requirements that all felons pay their outstanding legal financial obligations are rationally related to legitimate government interests.

Having established that rational-basis review is the appropriate standard for scrutinizing Amendment 4 and SB-7066, the only remaining question is whether there exists a rational basis for restoring felon voting rights only when a felon's sentence is complete, including payment of any financial obligations imposed as part of the sentence. Such a basis clearly exists.

Where rational-basis review applies, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Rather, laws challenged under

this deferential standard "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). In other words, Amendment 4 and SB-7066 must survive "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). And the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

At the outset, the State surely has a legitimate interest in promoting the rule of law by insisting that all felons fully repair the harm that they have wrought on society before being allowed to vote:

> Just as States might reasonably conclude that perpetrators of serious crimes should not take part in electing government officials, so too might it rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights.

Harvey, 605 F.3d at 1079.

Moreover, to assess the rationality of Amendment 4 and SB-7066, it is important to remember that they are not "aimed at encouraging the collection of payments from *indigent* felons, but from *all* felons." *Bredesen*, 624 F.3d at 748.

Therefore, the People of Florida and the State Legislature "may have been concerned, for instance, that a specific exemption for indigent felons would provide an incentive to conceal assets and would result in the state being unable to compel payments from some non-indigent felons." *Id.* Moreover, it is the Florida Legislature's "prerogative to legislate for the generality of cases," *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 556 (2012), rather than providing for case-by-case exceptions to a general rule, *see Califano v. Jobst*, 434 U.S. 47, 52 (1977) (upholding a statutory scheme under rational-basis review in which Congress "elected to use simple criteria" "[i]nstead of requiring individualized proof on a case-by-case basis"); *see also Burton v. Tampa Hous. Auth.*, 271 F.3d 1274, 1284–85 (11th Cir. 2001) (describing *Jobst*).

Absent any evidence that felons unable to pay their outstanding legal financial obligations vastly outnumber those able to pay, a court cannot conclude that Amendment 4 and SB-7066 have "the effect of excluding from [restoration] so [many felons]" as to render their criteria "wholly unrelated to the objective[s] of" the laws. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 316 (1976); *see also Jobst*, 434 U.S. at 55 ("The broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples."). Just because the People of Florida and the State Legislature have chosen not to restore felons' voting rights "more precisely through

individualized" consideration of their financial circumstances "is not to say that the objective of" ensuring that *all* felons pay their debt to society "is not rationally furthered." *Mass. Bd. of Ret.*, 427 U.S. at 316.

Additionally, rational-basis review takes cognizance of administrative concerns, including the reduction of administrative costs. *See Armour*, 566 U.S. at 682–85. "The administrative difficulties of individual eligibility determinations are without doubt matters which [legislatures] may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal." *Weinberger v. Salfi*, 422 U.S. 749, 784 (1975). The State possesses a finite amount of resources that it must allocate among its citizens and programs and it therefore has a legitimate interest in putting those resources to their highest use. A vast bureaucratic system designed to provide individualized determinations as to whether up to 430,000 felons can or cannot afford to pay their fines and restitution would entail a significant cost that the State can rationally choose not to incur.

Moreover, even aside from simply reducing administrative expense, States may rationally adopt general rules to more efficiently operate a given regulatory scheme. For example, as the Supreme Court has said in the welfare-benefit context, "[a] process of case-by-case adjudication that would provide a 'perfect fit' in theory would increase administrative expenses to a degree that benefit levels would probably be reduced, precluding a perfect fit in fact." *Califano v. Boles*, 443 U.S.

282, 284–85 (1979); *see also Lyng v. Castillo*, 477 U.S. 635, 640–41 (1986) ("[T]he Legislature's recognition of the potential for mistake and fraud and the cost-ineffectiveness of case-by-case verification of claims . . . unquestionably warrants the use of general definitions in this area." (footnote omitted)). Likewise, a system here that would force the State to compare the financial resources and financial obligations of every felon seeking to restore his or her right to vote would strain the State's registration apparatus. Meanwhile, a bright-line rule treating all felons equally permits the State to more efficiently reckon with the effects of Amendment 4 on the State's electoral system. General rules are rational even if they purportedly "produce seemingly arbitrary consequences in some individual cases." *Jobst*, 434 U.S. at 53; *see also Dandridge*, 397 U.S. at 485 ("The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." (quoting *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69–70 (1913))).

Finally, although this discussion of the rational-basis standard has assumed that the State provides felons unable to pay fines or restitution with no avenue to restore their right to vote, the State *does* provide for such opportunities, which *Johnson* held satisfies any obligations the State may have in this regard. *See* 405 F.3d at 1216–17 n.1. SB-7066 itself has provisions allowing a court to modify any and all outstanding financial obligations, including converting them to community service

hours or waiving them entirely, and, upon the payee's approval may terminate any outstanding restitution owed. *See* 2019-162 Fla. Laws 29 (codified at FLA. STAT. § 98.0751(2)(a) (2019)). Furthermore, felons with outstanding fines and fees may apply for restoration of civil rights and other relief through the executive clemency process. *See* Florida Rules of Executive Clemency 5(C), (E), https://bit.ly/3499I8o. The State therefore does not inexorably deprive felons lacking the financial resources to discharge their fines and restitution of the opportunity to gain access to the franchise.

In the end, Plaintiffs have failed to show a substantial likelihood of success on the merits of their equal-protection claim. That failure alone is sufficient to reverse the district court's order. *See Callahan v. U.S. Dep't of Health & Human Servs.*, 939 F.3d 1251, 1265 n.13 (11th Cir. 2019) ("Because we hold that . . . plaintiffs had failed to demonstrate a substantial likelihood of success, we need not consider whether the remaining factors weigh in favor of a preliminary injunction.").

B. Amendment 4's and SB-7066's requirement that felons complete their sentences before being restored their right to vote is not a tax prohibited by the Twenty-Fourth Amendment.

Plaintiffs argued below that SB-7066 "contravenes the Twenty-Fourth Amendment's prohibition on laws 'deny[ing] or abridg[ing]' the right to vote 'by reason of failure to pay any poll tax or other tax.' " App. 148 (Doc. 98-1 at 46). They contended that SB-7066 meets the definition of "other tax" because it "requires that

[Plaintiffs] pay a variety of fines and fees for the general upkeep of Florida's court system in order to vote." App. 149 (*Id.* at 47). The district court did not make a "definitive ruling on whether the Florida fees are taxes within the meaning of the Twenty-Fourth Amendment" because such a ruling would not have resulted in a different preliminary injunction. App. 520 (Doc. 207 at 43). We nonetheless address this issue because the court opined on it and Plaintiffs may raise it as an alternate ground for affirmance.

The district court first noted that Florida has not "explicitly imposed a poll tax," as the "financial obligations at issue were imposed as part of a criminal sentence," which "existed separate and apart from, and for reasons unrelated to, voting." App. 517 (Doc. 207 at 40). The court then went on to consider whether SB-7066 falls under the "other tax" in the Twenty-Fourth Amendment. It reasoned that some of the financial obligations—criminal fines and restitution—are plainly not taxes but opined that "[t]he issue is much closer for other amounts routinely assessed against . . . criminal defendants." App. 518–19 (Doc. 207 at 41–42).

While the district court ultimately declined to rule on the issue, its analysis, which mirrors Plaintiffs' arguments below, is wrong for two main reasons. First, the Twenty-Fourth Amendment does not apply when the right to vote has been constitutionally forfeited. Second, even if the Twenty-Fourth Amendment applied,

legal financial obligations imposed as part of a criminal sentence—whether restitution, fines, or other fees—do not qualify as unconstitutional taxes.

1. The Twenty-Fourth Amendment does not apply to Amendment 4 and SB-7066.

The district court's first misstep was to apply the Twenty-Fourth Amendment. The court dismissed out of hand the issue of whether the Amendment applies: "The State says the amendment does not apply to felons because they have no right to vote at all, but that makes no sense. A law allowing felons to vote in federal elections but only upon payment of a $10 poll tax would obviously violate the Twenty-Fourth Amendment." App. 517 (Doc. 207 at 40). But the court then undermined its short-shrift explanation in the very next line by noting that "Florida has not, of course, explicitly imposed a poll tax." *Id.* The court thus failed to consider the important distinction involved in this case—that felons do not have a fundamental right to vote. As the Sixth Circuit explained in a similar challenge:

> First, and most fundamentally, the re-enfranchisement law at issue does not deny or abridge any rights; it only restores them. As convicted felons constitutionally stripped of their voting rights by virtue of their convictions, Plaintiffs possess no right to vote and, consequently, have no cognizable Twenty–Fourth Amendment claim. The challenged provisions do not disenfranchise them or anyone else, poor or otherwise; [The State's] indisputably constitutional disenfranchisement statute accomplished that.

Bredesen, 624 F.3d at 751. Several courts have affirmed this reasoning.[5] The district court's refusal to acknowledge this issue—let alone find that the Twenty-Fourth Amendment does not apply in a restoration circumstance—makes it an outlier in comparison to other courts that have considered similar challenges to legal-financial-obligation requirements tied to felon re-enfranchisement.

Plaintiffs' challenge to SB-7066 is fundamentally different than the leading Supreme Court cases addressing poll-tax claims because, in those cases, taxes were

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[5] *See Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010) (O'Connor, J.) ("Plaintiffs' right to vote was not abridged because they failed to pay a poll tax; it was abridged because they were convicted of felonies. Having lost their right to vote, they now have no cognizable Twenty–Fourth Amendment claim until their voting rights are restored."); *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."); *see also Thompson v. Alabama*, 293 F. Supp. 3d 1313, 1332–33 (M.D. Ala. 2017) (citing *Bredesen* and *Harvey* 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").

The district court cited *Bredesen* and *Harvey* for the proposition that "[e]very court that has considered" whether financial obligations imposed as part of a criminal sentence were poll taxes "has concluded that such a preexisting obligation" does not qualify. App. 517 (Doc. 207 at 40). The court even noted that these financial obligations "existed separate and apart from, and for reasons unrelated to, voting." *Id*. While it is true that these courts ultimately concluded state requirements to satisfy financial obligations imposed as a criminal sentence were not poll taxes, the court conveniently ignored the language explaining why—that the Twenty-Fourth Amendment does not apply in re-enfranchisement cases. *See Bredesen*, 624 F.3d at 751; *Harvey*, 605 F.3d at 1080.

imposed on citizens who were eligible to vote. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), which was decided on equal-protection grounds, the Supreme Court struck down a poll tax imposed on all citizens of the State who were otherwise eligible to vote. *Id.* at 667. Likewise, *Harman v. Forssenius*, 380 U.S. 528 (1965), involved a statute that required all voters to either pay a poll tax or file a certificate of residency six months before a federal election. *Id.* at 540. In both instances, the state sought to place a tax directly on the right to vote for eligible voters.

Neither Amendment 4 nor SB-7066 denies the right to vote to otherwise qualified voters seeking to exercise a pre-existing right. Rather, they provide requirements for re-enfranchisement. This distinction is significant. The Constitution does not require the State to allow felons to vote. *See Richardson*, 418 U.S. at 53–56; *see also Johnson*, 405 F.3d at 1217. The requirement that felons must satisfy financial obligations imposed as part of their sentences does not condition an existing right to vote on the payment of a fee; rather, the requirement is a condition of "the restoration of [felons'] civil rights." *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000). As a result, Amendment 4 and SB-7066 do not implicate the Twenty-Fourth Amendment, and the district court wrongly discounted the State's argument on that basis.

2. Even if the Twenty-Fourth Amendment applied, financial obligations imposed as part of felons' sentences are not unconstitutional taxes.

After casually dismissing the State's argument that the Twenty-Fourth Amendment does not apply, the district court erred again in its parsing of the different financial obligations imposed as part of felons' sentences. After conceding that the financial obligations at issue were not poll taxes, the court considered whether these obligations qualify as an "other tax" under the Twenty-Fourth Amendment. App. 517–20 (Doc. 207 at 40–43). It first concluded that *when* or *why* the obligation was incurred do not change the Twenty-Fourth Amendment analysis: "There is no defensible way to read 'any other tax' to mean only any tax imposed at the time of voting or only any tax imposed explicitly for the purpose of interfering with the right to vote." App. 518 (Doc. 207 at 41). Next, the court analyzed categories of financial obligations to evaluate whether they are taxes. *Id.* It defined a "tax" as an "enforced contribution to provide for the support of the government." App. 519 (Doc. 207 at 42) (quotation marks omitted) (quoting *United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 606 (1975)). The court concluded that criminal fines are not taxes because they are criminal penalties and the "primary purpose is to punish the offender, not to raise revenue." *Id.* And restitution did not meet the definition because it is "intended to compensate the victim, not raise revenue for the government." *Id.* But the court noted that "[t]he issue is much closer for other

amounts routinely assessed against Florida criminal defendants," as Florida "pay[s] for its criminal-justice system in significant measure through such fees."[6] *Id*. However, the court did not give a "definitive ruling on whether the Florida fees are taxes within the meaning of the Twenty-Fourth Amendment . . . because it [would] not affect the ruling on the preliminary-injunction motion . . . ." App. 520 (Doc. 207 at 43).

Once again, the district court failed to consider the important distinction that felon re-enfranchisement has on the Twenty-Fourth Amendment analysis (assuming that the Amendment even applies in this context). First, there is an absence of case law on what constitutes an "other tax" under the Twenty-Fourth Amendment. Although "other tax" appears in the text of the Twenty-Fourth Amendment, it seems that "[n]either the Supreme Court nor any Circuit Court of Appeals has . . . ever applied the Twenty-Fourth Amendment in any context that did not involve an explicit and unambiguous poll tax." *Johnson v. Bredesen*, 579 F. Supp. 2d 1044, 1056 (M.D. Tenn. 2008), *aff'd*, 624 F.3d 742. In fact, the Fourth Circuit declined to find that a payment more explicitly tied to regaining the right to vote (rather than

[6] The court also factored into its analysis that these fees apply to criminal defendants who are found guilty as well as "those who enter no-contest pleas that resolve their cases without an adjudication of guilt." App. 519 (Doc. 207 at 42). But Appellants fail to see how adjudication of guilt factors into the analysis when the proper analysis should turn on whether these financial obligations are part of felons' criminal sentences, which Plaintiffs concede. *See infra* Part I.B.2.

one incurred as part of a criminal sentence) violated the Twenty-Fourth Amendment. *See Howard*, 2000 WL 203984, at *2. The court concluded that "Virginia's practice of requiring [felons] to pay a $10 fee to the Circuit Court of Richmond in order to begin the process of having [their] civil rights fully restored" was not an unconstitutional poll tax because the fee was not a condition on a felon's right to vote but on the restoration of his civil rights. *Id.* Thus, this Court would take an unprecedented step if it held that laws requiring felons to meet financial obligations under their sentences constituted "other tax[es]" under the Twenty-Fourth Amendment.

Second, other courts that have considered whether the requirement that felons meet their financial obligations before regaining the right to vote have not, unlike the district court, divorced the payment from the context of the incurred obligation: as part of a felony sentence. In *Bredesen*, the Sixth Circuit upheld Tennessee's re-enfranchisement statute requiring felons to complete court-ordered restitution and child-support obligations because these payments are not "taxes on voting imposed by the state." 624 F.3d at 751. "Unlike poll taxes, restitution and child support represent legal financial obligations Plaintiffs themselves incurred." *Id.*; *see also Harvey*, 605 F.3d at 1080 ("That restoration of [felons'] voting rights requires them to pay all debts owed under their criminal sentences does not transform their criminal fines into poll taxes."). In other words, the State did not force individuals to incur

these fees—they are the result of pleading no contest or being found guilty of a felony.

The State is exercising its "power to fix qualifications" for voting, *Harper*, 383 U.S. at 668, as it "permissibly limits the vote to individuals without felony convictions . . . and lawfully conditions the restoration of voting rights on satisfaction of such court-ordered obligations that exist independently of the re-enfranchisement statute or any tax law violations," *Bredesen*, 624 F.3d at 751 (citation omitted). In other words, the People of Florida's decision, through the passage of Amendment 4, to condition the restoration of the right to vote for felons "upon completion of all terms of sentence" constitutes a legitimate qualification for voting. *See, e.g.*, *Richardson*, 418 U.S. at 53 (explaining that states may constitutionally add qualifications for voting based on an individual's criminal record); *see also Coronado v. Napolitano*, No. 07-1089, 2008 WL 191987, at *5 (D. Ariz. Jan. 22, 2008) ("It follows that, having decided to re-enfranchise ex-felons, Arizona may permissibly fix as a qualification the requirement that those individuals complete the terms of their sentences."). Plaintiffs wrongly characterize Florida law as requiring payment of a fee for the ability to vote. That does not accurately reflect either Amendment 4 or SB-7066, both of which merely seek to ensure full compliance with criminal sentences. For example, felons who have not fully served their terms of imprisonment are not eligible for re-enfranchisement simply by paying

the financial obligations of their sentences. Rather, the law requires the completion of *all* terms of sentence before felons can qualify for restoration of their rights. *See Coronado*, 2008 WL 191987, at *5 (explaining that Arizona's felony re-enfranchisement law requiring payment of fines and restitution did not "make ability to pay 'an electoral standard,' but limit[s] re-enfranchisement to those who have completed their sentences—including the payment of any fine or restitution imposed").

Considering this context, the district court's parsing of the different types of financial obligations felons incur as part of their sentences does not make sense. No matter where the money goes—whether to the victim (restitution) or to fund the criminal-justice system (court fees)—the incursion of the financial obligation (a criminal sentence) is the same. And Plaintiffs do not argue that court fees are *not* part of their sentences. Rather, they concede that the court costs the district court discussed are "fines and fees that may be assessed as *part of an individual's sentence*." App. 76 (Doc. 84 ¶ 70) (emphasis added). If these fees are legitimate portions of a felons' criminal sentence, there is no conceptual difference between them and fines or restitution, which other courts have ruled do not abridge the Twenty-Fourth Amendment. *See Bredesen*, 624 F.3d at 751 (requiring payment of restitution and child support); *Harvey*, 605 F.3d at 1070 (requiring payment of "any fine or restitution imposed"); *Thompson v. Alabama*, 293 F. Supp. 3d 1313, 1316,

1332–33 (M.D. Ala. 2017) (requiring payment of all fines, court costs, fees, and restitution).

In fact, two courts previously declined to follow the district court's method of singling out court fees from the criminal sentence. In *Thompson*, the challenged re-enfranchisement statute required payment of "all fines, *court costs*, *fees*, and restitution." 293 F. Supp. 3d at 1316 (emphasis added). But the court did not disaggregate these "case-related legal financial responsibilities" before concluding the requirement of such payments did not abridge the Twenty-Fourth Amendment, likely because the plaintiffs there—rightly—did not distinguish amongst the categories. *See id.* at 1330 n.11. Further, an amicus in *Harvey* made an argument similar to the district court's consideration of court fees. *See* Amicus Br. of Brennan Center of Justice in Supp. of Pls.' and Reversal, *Coronado v. Brewer*, No. 08-17567, Doc. 8, at 9–11 (Feb. 2, 2009). It contended that requiring payment of legal financial obligations constituted poll taxes, at least in part, because those payments include state-imposed penalty assessments on *all* felony fines, which generate income for several state funds. *Id.* But the Ninth Circuit did not take the bait. In concluding that felons had "no cognizable Twenty-Fourth Amendment claim until their voting rights are restored," the court, speaking through Justice O'Connor, explained "[t]hat restoration of their voting rights requires [felons] to pay *all debts owed* under their

criminal sentences does not transform their criminal fines into poll taxes." *Harvey*, 605 F.3d at 1080 (emphasis added).

In sum, even if the Twenty-Fourth Amendment applied to statutes providing re-enfranchisement for felons, requirements that felons pay the financial obligations of their criminal sentences do not qualify as "other tax[es]" under the Amendment. The state can affix qualifications for restoring the right to vote based on an individual's completion of all terms of a criminal sentence, including court fees.

C. Even if Plaintiffs have shown a substantial likelihood of success on the merits of their Fourteenth Amendment or Twenty-Fourth Amendment claims, they have not shown that they are legally entitled to a partial injunction of Amendment 4 and SB-7066.

Even if Plaintiffs could show that Amendment 4 and SB-7066 likely violate the Equal Protection Clause or Twenty-Fourth Amendment as applied to felons unable to complete the financial components of their sentence, they are unlikely to show that they are legally entitled to the kind of partial injunction entered by the district court. That is because a correct application of Florida's principles of severability would require not simply enjoining the relevant portions of SB-7066 against those unable to pay. It would require invalidating Amendment 4 itself.

Severability of state legislative provisions is "a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). The Florida test for the severability of legislative enactments is as follows:

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Smith v. Dep't of Ins., 507 So. 2d 1080, 1089 (Fla. 1987) (citation omitted). This same test applies to constitutional amendments adopted by Florida voters. *See Ray v. Mortham*, 742 So. 2d 1276, 1281 (Fla. 1999).

To be clear, the Governor and the Secretary do not believe that Amendment 4 or SB-7066 violate the Constitution. Once the district court decided that Plaintiffs were likely to succeed on the merits of their equal-protection claim, however, it should have applied Florida's severability test to Amendment 4. In applying this severability test, the district court should have concluded that Amendment 4 itself was unconstitutional. Amendment 4 changed Article VI, section four of the Florida Constitution to declare 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." Amendment 4 conditions that *any* felon wishing to restore his voting rights must first complete "all terms of sentence." If that condition cannot be applied constitutionally to felons unable to pay their

outstanding obligations, then for those felons "all terms of sentence" would not mean "all terms of sentence."

This result is manifestly inconsistent with the expressed intent of Florida's voters. The key question for severability purposes "is whether the overall legislative intent is still accomplished without the invalid provision." *Searcy, Denney, Scarola, Barnhart & Shipley, Etc. v. State*, 209 So. 3d 1181, 1196 (Fla. 2017). The overall intent of Amendment 4 was not simply to restore felons' voting rights full stop. Nor was the overall intent of Amendment 4 to restore felons' voting rights upon only the completion of a period of incarceration. The overall intent of Amendment 4 was, as the district court itself recognized, to restore felons' voting rights "only when their punishment was complete—when they 'paid their debt to society.'" App. 493 (Doc. 207 at 16). The condition that felons complete "all terms of sentence" cannot be disaggregated from the remainder of Amendment 4. This conclusion regarding Amendment 4's overall purpose is further reinforced by the "ballot summary" that explained the central effect of the Amendment: "This amendment restores the voting rights of Floridians with felony convictions *after they complete all terms of their sentence* including parole or probation." Fla. Div. of Elections, *Constitutional Amendments and Revisions for the 2018 General Election* at 10 (2018) (emphasis added), https://bit.ly/34hXLxn.

In other words, the condition that felons complete their sentences was not an afterthought. It was not an ancillary component of the Amendment. Rather, it was an essential part of the constitutional bargain and inextricably related to the benefit conferred by Amendment 4. In no way is it "self-evident that the [People] would have approved the remainder of the [Amendment] without the illegal portion had [they] appreciated the deficiencies of the latter." *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991).

Under Florida law therefore, "the good and the [allegedly] bad features" of Amendment 4 are "inseparable in substance" such that it cannot be said that the People of Florida "would have passed the one without the other." *Smith*, 507 So. 2d at 1089. Especially in light of the State's nearly 200-year history of not extending the franchise to convicted felons, it is implausible that Florida voters would have permitted a large swath of felons to recapture their voting rights without fully repaying their debts to society. Because it is "virtually impossible" to sever the allegedly unconstitutional language from Amendment 4 without "defeating the obvious purpose of the [Amendment]," Florida law does not permit severability here. *Richardson v. Richardson*, 766 So. 2d 1036, 1041 (Fla. 2000). Should the Plaintiffs ultimately demonstrate that SB-7066 violates the federal Constitution, then logically Amendment 4 must also violate the federal Constitution and, therefore, the entirety of Amendment 4 must fall.

Moreover, the Florida courts will not sever a provision that "would expand the statute's reach beyond what the Legislature contemplated." *State v. Catalano*, 104 So. 3d 1069, 1081 (Fla. 2012). Rather, showing appropriate deference to the Legislature—or, as here, the People of Florida—the courts "will not . . . sever provisions that would effectively expand the scope of the statute's intended breadth." *Id.* Partially enjoining the requirement that felons complete the terms of their sentences would broaden Amendment 4 to provide automatic restoration of voting rights to a larger segment of the felon population than the People of Florida intended to benefit. Because Plaintiffs' constitutional arguments, even if successful, would not justify the scope of the preliminary injunction entered by the district court, they have not shown a likelihood of success on their ultimate legal claim: that they are entitled to a restoration of their voting rights.

II. Plaintiffs Have Failed To Establish Irreparable Harm.

In addition to showing that Plaintiffs have not demonstrated a substantial likelihood of success on the merits, the remaining factors also favor reversing the preliminary injunction.

First, the district court misconstrued Plaintiffs' harm absent a preliminary injunction. It explained that "when a state wrongly prevents an eligible citizen from voting, the harm to the citizen is irreparable." App. 528 (Doc. 207 at 51). But the court's analysis rests on the erroneous conclusion that Plaintiffs have a constitutional

right to vote. The Constitution allows a state to deny the right to vote to convicted felons, and it does not mandate that states create a system for restoring their right to vote. *See Richardson*, 418 U.S. at 53–56; *see also Johnson*, 405 F.3d at 1217. After correcting the court's flawed assumption that they are eligible voters, Plaintiffs cannot meet their burden of showing they will be harmed—irreparably or otherwise—absent a preliminary injunction. Plaintiffs are not harmed by not being able to exercise a right they are not entitled to. In fact, the district court's enjoinment of SB-7066 when Plaintiffs are *not* likely to succeed on the merits might *create* rather than prevent a harm for Plaintiffs by providing them with false reliance on improperly granted voting rights, which could be removed again if the State prevails on the merits.[7]

III. The Threatened Injury to Plaintiffs Does Not Outweigh the Harm Suffered by the State in Complying with the Injunction.

Conversely, the district court understated the State's harm. First, it noted that while wrongly allowing a felon to vote is "not insubstantial," "the State's interest in *preventing* votes by *ineligible* voters is no greater than its interest in *allowing* votes by *eligible* voters." App. 529 (Doc. 207 at 52). But this paltry analysis ignores the State's substantial interest in enforcing its statutes and ensuring the integrity of the

[7] Whether Plaintiffs would be taken off the voter rolls would, of course, depend upon whether they fulfill their financial obligations in accordance with SB-7066.

electoral process. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *accord, e.g.*, *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). The voters of Florida passed Amendment 4, and the State seeks to implement the constitutionally expressed will of the People through SB-7066. The preliminary injunction thwarts the State's efforts and defies the People's wishes, as it allows individuals to register and vote who are not eligible under Amendment 4.

The harm potentially could multiply, as the district court is considering extending the preliminary injunction to Plaintiffs' subclass if it is certified. Plaintiffs' proposed subclass includes " '[a]ll persons otherwise eligible to register to vote in Florida who are denied the right to vote pursuant to SB 7066 because they are unable to pay off their outstanding [legal financial obligations] due to their socioeconomic status.' " App. 463–64 (Doc. 172-1 at 3–4). Plaintiffs admit that over 430,000 former felons have outstanding financial obligations. App. 466 (*Id.* at 6). An extension to this group could change the outcome of the upcoming elections by allowing potentially hundreds of thousands of convicted felons to register and vote who are not eligible under Amendment 4. Recent history serves as an example of the potential magnitude of such harm. Most memorably, the Presidential Election in

2000 was decided by a difference of 537 total votes in the State of Florida. *See, e.g.*, *Harris v. Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1320 (N.D. Fla.), *aff'd sub nom. Harris v. Fla. Elections Comm'n*, 235 F.3d 578 (11th Cir. 2000).

Next, the district court contended that the State could minimize its potential harm by "put[ting] in place an administrative process through which genuine inability to pay can be promptly addressed" App. 529 (Doc. 207 at 52). But the court did not even consider the burdens associated with such a task. The State has "a substantial interest in avoiding chaos and uncertainty in its election procedures." *Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018). With the March 2020 Presidential Preference Primary quickly approaching, the State faces significant time pressure for complying with the Court's order, including creating a method for determining whether someone is "genuinely unable to pay" outstanding financial obligations. *See id*. The district court's order does not provide a standard for evaluating a convicted felon's ability to pay, nor does it give the State any guidelines for creating one consistent with its opinion.

The State's burden would not end with finding a manageable standard for evaluating ability to pay. Implementing new procedures for this determination would also create a significant hardship for the State, especially if the district court extends the preliminary injunction to the subclass. An extension to hundreds of thousands of

individuals would require the State to expend substantial resources making individual determinations about the socioeconomic status of hundreds of thousands of individuals. What is more, if the State succeeds on the merits—which it has shown a substantial likelihood of doing—the newly adopted procedures would need to be changed yet again, requiring the State to take voters off the rolls who are not in compliance with SB-7066 or Amendment 4.

Finally, the district court noted, without explanation, that "any damage that may result from the injunction does not outweigh an eligible [Plaintiff's] interest in voting." App. 529 (Doc. 207 at 52). This cannot be true. On one end of the balance are Plaintiffs' interests in re-enfranchisement, which the State has shown they are not entitled to under the federal Constitution. And on the other is the State's burden in complying with the court's order, as well as ensuring the integrity of the electoral process and outcome. The balance clearly favors the State and weighs heavily against a preliminary injunction.

IV. The Preliminary Injunction Is Against the Public Interest.

Finally, the district court also wrongly concluded that the injunction is in the public interest. The court merely explained: "The public interest lies in resolving this issue correctly and implementing the proper ruling without delay. Complying with the Constitution serves the public interest. Those with a constitutional right to vote should be allowed to vote. The countervailing interests do not tip the balance."

App. 529 (Doc. 207 at 52). While the court's platitudes are correct in the abstract, its conclusion is again premised on the false assumption that Plaintiffs are likely to succeed on the merits. The People of Florida have a substantial interest in the enforcement of valid laws. *See King*, 567 U.S. at 1301. It is also in the public interest to "ensur[e] proper consultation and careful deliberation before overhauling [the State's] voter-eligibility requirements," as the Court's order would force the State to devise and execute a plan for evaluating Plaintiffs' economic status based on the court's unclear standard of "genuinely unable to pay." *Hand*, 888 F.3d at 1215. And if the injunction is extended to the subclass, it would require the State to do so for hundreds of thousands of convicted felons.

What is more, implementation of the Court's order could confuse the public about the status of Amendment 4. As demonstrated above, Plaintiffs are not likely to prevail on the merits of their claims. A reversal in course could lead to misapprehension of voting requirements, which undermines public confidence in the rules governing elections. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."). And a reversal on the merits could also call into question any election in which individuals who are not eligible to vote under Amendment 4 are able to participate.

Overall, the public interest disfavors the preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's preliminary injunction order.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of FED. R. APP. P. 27(d)(2)(A) because this brief contains 12,965 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: December 13, 2019

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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 December 13, 2019. 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.

Dated: December 13, 2019

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