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.

APPELLANTS' REPLY BRIEF

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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CERTIFICATE OF INTERESTED PERSONS

Pursuant to FED. R. APP. P. 26.1 and 11th Cir. Rule 26.1, I certify that the Certificates of Interested Persons contained in the Brief of Appellants and the other briefs that have been filed in this appeal are, to the best of my knowledge, complete.

Dated: January 22, 2020

s/ Charles J. Cooper
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INTRODUCTION

Plaintiffs fail to appreciate the longstanding principle—fatal to all their arguments—that felons forfeit their constitutional right to vote. This is reflected in the decisions of the Supreme Court and this Court, *see Richardson v. Ramirez*, 418 U.S. 24 (1974); *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc), and in the longstanding practice of the State of Florida. But in 2018, the law-abiding voters of Florida graciously amended the State's Constitution to loosen its restrictions on felon voting. The voters did not, however, reenfranchise felons unconditionally. Instead, they drew a clear line: access to the franchise would be restored only upon a felon's completion of "*all terms of sentence*." And as the Florida Supreme Court has now confirmed, "all terms of sentence" unambiguously includes *both* durational *and* financial aspects of criminal punishment. *See Advisory Op. re: Implementation of Amendment 4*, No. SC19-1341, 2020 WL 238556, at *9 (Fla. Jan. 16, 2020).

The People of Florida therefore determined to welcome felons back into the electorate only after they repaid their debt to society *in full*. Because felons have forfeited their constitutional right to vote, this determination does not implicate precedents addressing limitations on that right. Instead, it is to be judged by the standard of rationality that generally governs allocation of discretionary government benefits. *See Harvey v. Brewer*, 605 F.3d 1067, 1079–80 (9th Cir. 2010). Judged by

that standard, the People of Florida's choice easily passes muster. Indeed, by insisting on a full measure of justice from each felon, the voters of Florida have chosen perhaps the *most* rational standard for determining when a felon should be allowed to vote. Certainly, they have chosen a constitutionally permissible standard.

It is no more relevant that some felons are not currently able to fulfill the *financial* aspects of their sentence than it is that some felons have not fulfilled, and may never be able to fulfill, the *durational* aspects of their sentence. The People of Florida have not imposed an arbitrary wealth-based qualification on otherwise eligible voters but instead have reasonably insisted that only felons who repay their debt to society in full will be able to vote. *See Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010); *Madison v. State*, 163 P.3d 757 (Wash. 2007) (en banc). And this determination applies equally to the multimillionaire white-collar criminal with a restitution order that exceeds his wealth as it does to an indigent felon with a relatively small fine.

Carving out an exception for felons who cannot afford their financial punishment would fundamentally alter Amendment 4. Indeed, in urging voters to support Amendment 4, the ACLU of Florida stated that it "would return the eligibility to vote to Floridians who have completed the terms of their sentences,

including any probation, parole, *fines, or restitution*."[1] Yet the ACLU Foundation, counsel for the *Gruver* Plaintiffs, now asserts that this limitation is *unconstitutional* as applied to those who cannot afford to pay. If this were correct—and Appellants vigorously contest that assertion—the proper remedy would be to enjoin Amendment 4 and SB-7066's implementation of it entirely. That would be the only way to honor the People of Florida's insistence on a full measure of justice. For these reasons, the preliminary injunction should be reversed.

ARGUMENT

I. Plaintiffs Are Unlikely To Succeed On The Merits.

A. The *Johnson* footnote does not control.

Plaintiffs wrongly insist that SB-7066 violates footnote 1 of this Court's decision in *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc). *See* Gruver Br. 34–39; Raysor Br. 16–19.

1. Plaintiffs forfeited any forfeiture arguments by confining them to a footnote. *See*; Gruver Br. 36 n.13; Raysor Br. 18 n.8; *Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n.16 (11th Cir. 1987).

Those arguments also lack merit. Appellants have consistently argued that SB-7066 does not violate the Equal Protection Clause, including by relying on

[1] *See ACLU of Florida 2018 Voter Guide on Select Constitutional Amendments*, ACLU FLA., https://bit.ly/2NyCTfp (emphasis added).

Johnson.[2] "Although new claims or issues may not be raised, new arguments relating to preserved claims may be reviewed on appeal." *Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1304 n.3 (11th Cir. 2008). Appellants are not barred on appeal from making a *specific* argument about a *single* case when the State's "general theory" on this issue "was raised repeatedly before the district court." *William Penn Life Ins. Co. of N.Y. v. Sands*, 912 F.2d 1359, 1362 n.2 (11th Cir. 1990).

At any rate, the *Johnson* footnote raises a pure question of law with general impact and it would be unjust for the Court not to independently consider its applicability when it implicates the constitutionality of state law, an issue of great public concern. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1332 (11th Cir. 2004).

2. *Johnson* does not distinguish between "poll taxes" prohibited by the Twenty-Fourth Amendment and other forms of wealth discrimination prohibited only by the Fourteenth. *Contra* Gruver Br. 37–39; Raysor Br. 18–19. *Johnson*'s discussion opens with: "The plaintiffs also allege that Florida's voting rights restoration scheme violates constitutional and statutory prohibitions *against poll taxes*." 405 F.3d at 1216–17 n.1 (emphasis added). And it closes by cautioning that the Court "say[s] nothing about whether conditioning an application for clemency

[2] *See* Pls.-Appellees' Suppl. App. 393–96; Doc. 204 at 13:2–14:6, 15:21–25; Suppl. App. 1646:14–1647:13.

on paying restitution would be an invalid *poll tax*." *Id.* (emphasis added). In these bookend sentences, the court discussed only "poll taxes."

And the sentence stating that "[a]ccess to the franchise cannot be made to depend on an individual's financial resources," *id.*, cites *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966). But *Harper* concerned a *poll tax*. *Johnson* understood *all* the plaintiffs' wealth-based arguments—including their Fourteenth Amendment claim—to fall under the broad rubric of unconstitutional "poll taxes." Therefore, when *Johnson* stated that it "sa[id] nothing about whether conditioning an application for clemency on paying restitution would be an invalid poll tax," 405 F.3d at 1216–17 n.1, it was not referring only to whether such a condition would violate the Twenty-Fourth Amendment.

This reading is bolstered by *Johnson*'s history. The *Johnson* plaintiffs did not clearly plead independent Fourteenth and Twenty-Fourth Amendment theories. Rather, in a single count they pleaded a single theory that the clemency rules were the "practical equivalent of a poll tax and mean that ex-felons' ability to regain the right to vote depends on their financial resources," therefore violating both the Fourteenth and Twenty-Fourth Amendments. Compl.-Class Action ¶ 84, *Johnson v. Bush*, No. 00-cv-3542, 2000 WL 34569743 (S.D. Fla. Sept. 21, 2000). When they later pressed a freestanding wealth-discrimination claim, the defendants criticized them for attempting to proffer "a wealth-discrimination claim they have not pled."

Brief of Defs.-Appellants, *Johnson v. Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003), 2002 WL 34346131, at *52. The plaintiffs offered no response in their reply and therefore conceded the point. *See Taylor v. Mentor Worldwide LLC*, 940 F.3d 582, 599 (11th Cir. 2019).

The panel decision—from which the en banc court drew the footnote—twice noted that it "affirm[ed] the district court's grant of summary judgment on the Plaintiffs' *poll tax claim*," without mentioning a separate "wealth-discrimination claim." *Johnson*, 353 F.3d at 1292 (emphasis added); *see id.* at 1308. Moreover, the panel treated the plaintiffs' Fourteenth and Twenty-Fourth Amendment arguments together, considering them in a single section of the opinion titled, "POLL TAX/WEALTH DISCRIMINATION CLAIMS." *Id.* at 1307. The plaintiffs did not further address this aspect of their case in their en banc briefing.

Because the clemency rules permitted restoration of voting rights for those unable to pay restitution, the *Johnson* court could affirm the dismissal of *all* the plaintiffs' wealth-based arguments without further analysis. And because the *Johnson* court did not *at all* need to address whether a system that conditioned clemency on paying restitution was unconstitutional, the court properly said "nothing" on the question. *See Williamson v. Brevard County*, 928 F.3d 1296, 1316–17 (11th Cir. 2019).

3. Until Plaintiffs' suit, no court or litigant had *ever* read *Johnson* to preclude States from conditioning felon reenfranchisement on completing financial aspects of punishment. For example, nowhere did the majority opinion or lengthy dissent in *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010), so much as cite the *Johnson* footnote.

Moreover, although the *Bredesen* plaintiffs leveled the same kind of wealth-discrimination claim that Plaintiffs press here, not once did those plaintiffs cite or discuss the *Johnson* footnote. Not in their opening brief, their reply, nor their petition for rehearing en banc. And, most tellingly, not in their petition for certiorari to the Supreme Court, even though they had every reason to highlight any discontinuity that existed between *Bredesen* and *Johnson*. *See* SUP. CT. R. 10(a). In fact, one of the attorneys that represented the *Bredesen* plaintiffs, Laughlin McDonald, appeared on the ACLU's amicus brief in *Johnson*. *See* Seven Nonprofit Pub. Interest Orgs.' Amicus Curiae Br. in Support of Pls.-Appellants, *Johnson*, 353 F.3d 1287, 2002 WL 34346127. That the *Bredesen* plaintiffs saw no split confirms that none existed.

Neither coincidence nor oversight can explain why no litigant or judge has ever embraced the interpretation of *Johnson* advocated by Plaintiffs and adopted by the district court. This Court should reject this strained reading and hold what is obvious: *Johnson* did not decide this momentous Fourteenth Amendment issue in a brief and cryptic footnote.

B. SB-7066 is subject to rational-basis review.

Shorn of the allegedly dispositive character of the *Johnson* footnote, Plaintiffs' Fourteenth Amendment argument collapses. Wealth-discrimination claims are generally analyzed under rational-basis review. *See, e.g.*, *Papasan v. Allain*, 478 U.S. 265, 283–84 (1986). Plaintiffs' arguments to the contrary are meritless.

Plaintiffs' theory of discrimination centers on disparate impact: Florida's facially wealth-neutral law affects differently those who can and cannot pay their criminal penalties. That sort of disparate impact generally cannot succeed unless "a discriminatory purpose can be proven." *Joel v. City of Orlando*, 232 F.3d 1353, 1359 (11th Cir. 2000). Indeed, it is the law of this Circuit that "a reenfranchisement scheme could violate equal protection" only "if it had *both* the purpose and effect of invidious discrimination." *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018). Plaintiffs do not allege that the People of Florida and the Florida Legislature purposefully targeted felons who cannot pay their outstanding penalties. Their equal-protection claim fails for this reason alone.

Plaintiffs respond (Raysor Br. 36–37) that disparate impact *can* suffice to make out a wealth-discrimination claim in certain circumstances. But the precedents they invoke do them no good. The Supreme Court explained in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), exactly when the purposeful-discrimination standard does not

apply. Describing *Williams v. Illinois*, 399 U.S. 235 (1970), and *Griffin v. Illinois*, 351 U.S. 12 (1956), the *M.L.B.* court stated that when a statute's "operative effect exposes *only indigents*" to a risk of disadvantage, the statute visits " 'different consequences on two categories of persons;' they apply to all indigents *and do not reach anyone outside that class*." 519 U.S. at 127 (quoting *Williams*, 399 U.S. at 242) (second emphasis added).

Here, however, Plaintiffs cannot say that Amendment 4's and SB-7066's payment requirements disadvantage "all indigents and do not reach anyone outside that class." *Id.* The ordinary meaning of "indigency" is one who lacks the means to subsist. *See United States v. Shepherd*, 922 F.3d 753, 757–58 (6th Cir. 2019). SB-7066's payment requirements do not inhibit restoration for "all indigents" and no one "outside that class." First, indigent individuals who need only pay small fines or court fees are likely able to restore their voting rights after a reasonable period. Second, as Plaintiffs themselves emphasized below, SB-7066's impact is not limited to the indigent, as a person with "$52 million in . . . outstanding financial obligation . . . can be well beyond an indigent person, they could be a millionaire, and not have the resources to pay." *See* Pls.-Appellees' Suppl. App. 1781:2–10. Therefore, the operative effect of SB-7066 is that felons of all means will potentially find themselves unable—at least for a period—to regain their right to vote. Whether a given felon is able to restore his voting rights does not turn only on his current

wealth; it also depends on the crime he has committed and the financial obligations incurred because of that crime, as well as his ability, and willingness, to improve his financial circumstances.

Because the operative effect of SB-7066 does not uniquely disadvantage indigent felons, Plaintiffs should not be relieved of their burden to prove that SB-7066—although facially wealth-neutral—was enacted with a discriminatory purpose.

But even if Plaintiffs could plead a wealth-discrimination claim, that claim must be analyzed under rational-basis review. Indeed, this Court is *bound* to apply that standard because it is the law of this Circuit, *see Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), that "selective disenfranchisement or reenfranchisement of convicted felons" is subject to "standard" equal-protection rational-basis review, *Shepherd v. Trevino*, 575 F.2d 1110, 1114–15 (5th Cir. 1978). Plaintiffs' purported exceptions do not apply.

1. Plaintiffs' claims do not implicate any exception related to the political process.

In *M.L.B.*, the Court stated in dicta 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." 519 U.S. at 105. Plaintiffs strain to invoke this exception (Gruver Br. 40–50; Raysor Br. 21–22), but it does not apply here.

Plaintiffs overlook, or just ignore, Justice O'Connor's persuasive analysis of this issue in *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010). As Justice O'Connor explained, felons challenging schemes like SB-7066 "cannot complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted under the terms of" *Richardson v. Ramirez*, 418 U.S. 24 (1974). 605 F.3d at 1079. Therefore, "[w]hat plaintiffs are really complaining about is the denial of the statutory benefit of re-enfranchisement that [the state] confers upon certain felons." *Id.* And because restoration is merely the conferral of a statutory benefit, heightened scrutiny does not apply. *Id.* Plaintiffs point to no court that disagrees. In fact, the authorities uniformly side with Justice O'Connor. *See Bredesen*, 624 F.3d at 746 (majority opinion); *id.* at 755 (Moore, J., dissenting); *Madison v. State*, 163 P.3d 757, 766–68 (Wash. 2007) (en banc); *Thompson v. Alabama*, 293 F. Supp. 3d 1313, 1332 (M.D. Ala. 2017).

Harvey, to be sure, did not address whether requiring payment of fines and restitution from those unable to do so would be constitutional. But Justice O'Connor made clear that the "*rational basis test*" would apply to that question. *Harvey*, 605 F.3d at 1080 (emphasis added). Therefore, *Harvey* squarely stated that rational-basis review was the appropriate standard of scrutiny.

Plaintiffs also cite *Bynum v. Connecticut Commission on Forfeited Rights*, 410 F.2d 173 (2d Cir. 1969). But *Bynum* is inapposite for several reasons. First,

Bynum only held that a three-judge panel should have been convened to assess the plaintiff's claim, and it disclaimed any "need to labor or determine the merits." *Id.* at 176. Second, *Bynum* was decided five years *before Richardson* established that felons forfeit the right to vote. *Cf. Hayden v. Paterson*, 594 F.3d 150, 170 (2d Cir. 2010) (reviewing felon disenfranchisement laws under rational-basis review). Third, *Bynum* involved a flat fee that every felon had to pay to petition for restoration of his voting rights. Such a fee is entirely distinct from a requirement that a felon repay his debt to society in full before rejoining the electorate.

Finally, Plaintiffs' continued appeal (Gruver Br. 40–44; Raysor Br. 21–22) to *Harper* remains unavailing. First, *Harper* is not the only standard for reviewing voting-related laws. As Justice Brennan explained for a unanimous Court, when a statute

> does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law . . . the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights, is inapplicable; for the distinction challenged . . . is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise.

Katzenbach v. Morgan, 384 U.S. 641, 657 (1966). Because SB-7066 extends the franchise to felons otherwise disqualified, it cannot be "invalid under the Constitution [merely] because it might have gone farther than it did." *Id.* (quotation omitted); *see also Shepherd*, 575 F.2d at 1114–15.

Second, *Harper* held only that states may not "introduce wealth or payment of a fee as a measure of a voter's qualifications" or, in other words, they may not create "[l]ines drawn on the basis of wealth." 383 U.S. at 668; *see also McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). Florida has not "drawn a line" based on wealth or "introduce[d] wealth" as a measure of a voter's qualifications. *See Madison*, 163 P.3d at 769. The only line that SB-7066 draws is between felons who complete all terms of their sentence and those who do not. This line distinguishes between those who have, and those who have not, served the full duration of their sentence of incarceration no less than it distinguishes between those who have, and those who have not, paid the financial terms of their sentence in full. Plaintiffs' complaint that this line—that *all* terms of sentence be completed—makes it harder for some felons—not necessarily *indigent* felons—to regain their right to vote would apply no less for felons whose life expectancy is shorter than their term of incarceration.

SB-7066 is unlike the poll taxes and fees that *Harper* contemplated. Indeed, the only voting-related forms of wealth discrimination that Plaintiffs identify are poll taxes and candidate filing fees. And both of those share a common feature: They impose an arbitrary flat fee across the electorate that necessarily "ma[kes] affluence of the voter an electoral standard, and such a standard is irrelevant to permissible voter [or candidate] qualifications." *Gonzalez v. Arizona*, 677 F.3d 383, 409 (9th Cir.

2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *see Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 (2008) (opinion of Stevens, J.). The restrictions on voting restoration in SB-7066 *are* related to voter qualifications, as imposed by the Florida electorate, and they are tailored to ensuring that justice has been done in full in each felon's case before the felon may rejoin the electorate.

Indeed, this is also why the district court's hypothetical statute, which restored the right to vote for felons "with a net worth of $100,000 or more but no other felons," is unconstitutional while SB-7066 is not. App. 510–11. Such a statute would (1) draw an explicit line based on wealth; (2) be entirely unrelated to the felons' qualification to vote because it is unrelated to their sentences and individual debts to society; and (3) would not pass even rational-basis review. In short, the analogy drawn by the district court has nothing to do with this case.

Plaintiffs' argument, meanwhile, would endanger *any* law that made voting more expensive for some people than others, even if the additional cost were related to voter qualifications. For example, laws requiring voters to provide documents proving their identity are likely vulnerable under Plaintiffs' view, assuming some individuals would have to pay for the documents. The Ninth Circuit, sitting en banc, rejected precisely this sort of challenge, holding that "[r]equiring voters to provide documents proving their identity is not an invidious classification based on

impermissible standards of wealth or affluence, even if some individuals have to pay to obtain the documents." *Gonzalez*, 677 F.3d at 409; *see Crawford*, 553 U.S. at 198 n.17, 199. But if requiring some people to pay to *prove* their qualifications does not run afoul of *Harper*, then surely requiring them to pay criminal penalties to *become qualified* does not either.

2. Plaintiffs' claims do not implicate exceptions related to certain criminal and quasi-criminal cases.

Plaintiffs next claim that SB-7066 should be reviewed under heightened scrutiny because it falls into another exception. But Plaintiffs are really talking about two sets of exceptions. Plaintiffs often refer (Gruver Br. 53–56; Raysor Br. 34–37) to the so-called "*Griffin-Bearden* line of cases," meant to describe those equal-protection cases related to both *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Bearden v. Georgia*, 461 U.S. 660 (1983). However, *Griffin* and its progeny address a very different question than *Bearden* and its antecedents; the two sets of cases should be treated separately. Only by conflating these two lines of cases can Plaintiffs suggest that this case somehow falls into either one. After placing these cases into perspective, it becomes clear that neither category of cases applies here.

Griffin and its progeny represent a narrow exception to general equal-protection principles. *Griffin* primarily addressed "state laws that prevented an indigent criminal defendant from acquiring a transcript, or an adequate substitute for a transcript, for use at several stages of the trial and appeal process." *San Antonio*

Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 21 (1973); *see Williams*, 399 U.S. at 241. The Supreme Court eventually expanded *Griffin*'s reach to cover court fees related to divorce proceedings, *see Boddie v. Connecticut*, 401 U.S. 371 (1971); transcript fees in nonfelony cases, *see Mayer v. City of Chicago*, 404 U.S. 189 (1971); and fees to appeal the termination of parental rights, *see M.L.B.*, 519 U.S. 102.[3]

Griffin's ambit never extended beyond the central concern that indigent criminal defendants cannot be denied access to the judicial process merely because of failure to pay a fee, and that principle applies in a "narrow category of civil cases." *M.L.B.*, 519 U.S. at 562. Numerous Supreme Court decisions addressing *Griffin* have circumscribed it to securing access to the judicial process. *See, e.g.*, *Christopher v. Harbury*, 536 U.S. 403, 413 (2002); *Lewis v. Casey*, 518 U.S. 343, 354 (1996); *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 460 (1988); *see also Bush v. Sec'y, Fla. Dep't of Corr.*, 888 F.3d 1188, 1197 (11th Cir. 2018).

Plaintiffs' challenge does not involve "access to judicial processes in cases criminal or quasi criminal in nature." *M.L.B.*, 519 U.S. at 124 (quotation marks omitted). Indeed, Plaintiffs' theory here is analogous to one recently rejected by this Court in *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018). There, this Court refused to apply *Griffin* to the setting of bail for indigent arrestees because

[3] Plaintiffs also lump *Zablocki v. Redhail*, 434 U.S. 374 (1978), in with these cases. But *Zablocki* never cited *Griffin*, *Boddie*, or *Mayer*, and it involved a restriction on the fundamental right to marry. It is wholly inapposite.

there was no "judicial proceeding an indigent person *cannot* access by the terms of the [challenged law]." *Id.* at 1264. The court further explained that applications beyond legal access would render *Griffin* "not amenable to so narrow an exception and would apply to any government action that treats people of different means differently." *Id.*

So too here: Plaintiffs neither explain what judicial proceeding they may not access because of SB-7066, nor do they offer a limiting principle explaining how *Griffin* applies to this case but not *every other* instance where government action affects people of different means differently.

Plaintiffs' reliance on *Bearden* fares no better. *Bearden*'s holding derived from *Williams* and *Tate v. Short*, 401 U.S. 395 (1971). In *Williams*, the Supreme Court took *Griffin*'s "basic command" that "justice be applied equally to all persons," previously applicable only to "costs of litigation in the administration of criminal justice," 399 U.S. at 241, and applied it to a new domain, concluding that "an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense," *id.* At the same time, *Williams* noted that "nothing" in its holding precluded states "from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law." *Id.* at 243. One year later, in *Tate*, the Court modestly expanded *Williams* by holding that a State may not imprison an indigent defendant merely for

failure to pay a fine because of his inability to do so, where his criminal offenses were punishable only by fines. (Williams had committed a criminal offense that exposed him to *both* a fine and imprisonment.). *See* 401 U.S. at 396–98.

Together, *Williams* and *Tate* established a clear rule: "[I]mprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc); *see San Antonio*, 411 U.S. at 21–22.

Then, in *Bearden*, the Court confronted "whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution . . . ." 461 U.S. at 665. *Bearden* noted that "[t]he rule of *Williams* and *Tate* . . . is that the State cannot 'impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.' " *Id.* (quoting *Tate*, 401 U.S. at 398) (alterations in *Bearden*).

The *Bearden* court then recognized that the revocation of probation was, in substance, no different than the unconstitutional imprisonment imposed in *Williams* and *Tate*. *Id.* at 674. The Court therefore held "that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay" and if the probationer "could not pay despite sufficient bona

fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment." *Id.* at 672.

Like *Williams* and *Tate*, *Bearden*'s emphasis was focused on prohibiting the states from *imprisoning* individuals who fail to pay outstanding fines because of inability to do so. The Court even encouraged States to "consider alternative measures of punishment *other than imprisonment*," *id.* (emphasis added), to pursue their legitimate interests in "punishing the lawbreaker and deterring others from criminal behavior," *id.* at 671. This Court has likewise interpreted *Bearden* to create a dichotomy between imprisonment and other forms of punishment. *See United States v. Johnson*, 983 F.2d 216, 220 (11th Cir. 1993).

Plaintiffs assert (Gruver Br. 53–56; Raysor Br. 34–35) that *Bearden* is not limited to imprisonment, but Plaintiffs mistakenly reach that conclusion by conflating the *Williams-Tate-Bearden* line of cases with the *Griffin* line. It is true that *Griffin* has been extended to certain cases where imprisonment was not at issue. *See M.L.B.*, 519 U.S. at 119–24; *Mayer*, 404 U.S. at 196–97. But the *Griffin* cases, as described above, deal only with access to judicial process. *Bearden* and its antecedents dealt with an entirely different question about individuals' substantive liberty rights for failure to pay criminal fines, not merely a procedural right to access judicial process without payment of a flat fee. While both lines of cases concern wealth discrimination, they address distinct issues and are not interchangeable.

This Court would be taking an unprecedented step were it to apply heightened scrutiny to this case, which involves *neither* (1) failure to pay resulting in imprisonment *nor* (2) access to the judicial process. Nothing in the Supreme Court's precedents, or those of this Circuit, justify such a departure. Doing so would threaten to change a narrow exception to traditional equal-protection doctrine into a sweeping, entirely new approach to wealth-discrimination claims. It is implausible to "believe that *Bearden* . . . announced such radical results with so little fanfare." *Walker*, 901 F.3d at 1262.

There is another reason why neither the *Griffin* nor *Bearden* line of cases applies here. The Supreme Court departed from conventional equal-protection principles because both sets of cases "reflect both equal protection and due process concerns." *M.LB.*, 519 U.S. at 120; *see Bearden*, 461 U.S. at 665. As the Court explained in *Bearden*, the equal-protection concern in that case was "substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine." 461 U.S. at 666.

In fact, the Court in *Bearden* indicated that because these cases fit awkwardly in the traditional equal-protection framework, "the *more appropriate question* is whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process." *Id.* at 666 n.8

(emphasis added); *see Walker*, 901 F.3d at 1265. Whether government action is patently "arbitrary" or "unfair" sounds in "substantive due process." *See Hillcrest Prop., LLP v. Pasco Cty.*, 915 F.3d 1292, 1299 (11th Cir. 2019).

Plaintiffs have never claimed that SB-7066 violates substantive due process, nor have they argued that equal protection *and due process* concerns converge in this case. And while Plaintiffs observe that there is no "fundamental right" to probation, they neglect that "[t]he Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation." *Black v. Romano*, 471 U.S. 606, 610 (1985); *see Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973); *Whitehorn v. Harrelson*, 758 F.2d 1416, 1420 (11th Cir. 1985). That is because, like parole, probation "includes many of the core values of unqualified liberty." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

While probationers have a vested—albeit conditional—interest in remaining on probation, Plaintiffs here have *no right to vote* because they chose to commit felonies and, in turn, forfeited the right. As Justice O'Connor—the author of *Bearden*—explained, "[w]hat plaintiffs are really complaining about is the denial of the statutory benefit of re-enfranchisement that [Florida] confers upon certain felons." *Harvey*, 605 F.3d at 1079. Amendment 4 confers eligibility to vote only "*upon* completion of all terms of sentence." FLA. CONST. art. VI, § 4(a) (emphasis

added). Unlike a probationer, Plaintiffs have no constitutionally protected interest because Amendment 4 restores their eligibility to vote *only* once they satisfy the terms—all the terms—of their criminal sentence. It is a statutory benefit wholly dissimilar from probation. And "when dispensation of a statutory benefit is clearly at the discretion of [a State] . . . then there is no creation of a substantive interest protected by the Constitution." *Jean v. Nelson*, 727 F.2d 957, 981 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

Because due process and equal protection principles do not converge here, Plaintiffs cannot justify departing from the courts' usual framework for assessing wealth-discrimination claims. Rather, as in the mine-run of wealth-discrimination cases, "[t]he applicable standard [of review] is that of rational justification." *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973).

Finally, Plaintiffs claim (Raysor Br. 28 n.13) that heightened scrutiny is justified under *San Antonio Independent School District*, 411 U.S. 1. But *San Antonio rejected* heightened scrutiny, *see id.* at 22, so it cannot possibly support Plaintiffs here, particularly when Plaintiffs' claims do not fit the rationale of cases that have applied heightened scrutiny to wealth-discrimination claims. And even if *San Antonio* were applicable, Plaintiffs here—just like the losing plaintiffs in *San Antonio*—have failed to show that SB-7066 "operates to the peculiar disadvantage of any class fairly definable as indigent." *Id.* Moreover, because the State offers

alternative opportunities to restore voting rights, *see infra* Part I.C, Plaintiffs have not "sustained an absolute deprivation of a meaningful opportunity to enjoy th[e] benefit." *Id.* at 20; *see Walker*, 901 F.3d at 1263–64.

C. SB-7066's requirements are rationally related to legitimate government interests.

Review of SB-7066 must be limited to determine whether "it bears a rational relation to a legitimate government objective." *Kadrmas*, 487 U.S. at 461–62. And despite Plaintiffs' protestations (Gruver Br. 56–61; Raysor Br. 28–31) to the contrary, it clearly does.

The State has a legitimate interest in preventing felons from voting who do not fully pay for their crimes, whether the felon is, in the end, able to do so. In fact, the State's interest in "punishing those who violate the law" is "compelling." *Moran v. Burbine*, 475 U.S. 412, 426 (1986). A State even has a legitimate interest to *end some felons' lives* or take away their freedom *permanently* if the crime is serious enough. That is often because the State has concluded that those felons *deserve* such a punishment. *See Glossip v. Gross*, 135 S. Ct. 2726, 2769 (2015) (Breyer, J., dissenting) ("Retribution is a valid penological goal."). If states have a legitimate interest in asserting that some felons deserve death or life imprisonment, it is hard to imagine why a state cannot legitimately assert that felons do not deserve the right to vote and that felons unwilling or unable to pay their debts to society can *never* regain that right.

The People of Florida and the Florida Legislature have a legitimate interest in demanding from all felons a *full* measure of justice—defined by the terms of the felons' sentences—before granting eligibility to vote. Just as the State can withhold the right to vote from a 60-year-old with 40 years of imprisonment remaining on his sentence, it has a legitimate interest in demanding that a felon with $1,000 in fines, restitution, and fees pay off his full sentence. Should the incarcerated felon die before release from prison and should the felon with financial obligations be unable to pay them, then neither will have regained eligibility to vote because neither fully paid his debt to society. The State has a legitimate interest in ensuring that both kinds of felons are treated equally and in conditioning their eligibility to vote on the completion of their sentences, no matter how unlikely it is that they will do so.

Plaintiffs' entire argument against the rationality of Amendment 4 and SB-7066 boils down to their view that it is irrational to apply the interest described above "where individuals are unable rather than unwilling to pay." Raysor Br. 28. Perhaps Plaintiffs think it is unwise to require *all* felons to complete *all* terms of their sentences before being able to vote. But it is certainly not *irrational* for the State "to believe that the legislation would further the . . . purpose" of ensuring that *only* such felons are welcomed back to the electorate. In fact, the flat requirement that all sentences must be completed is probably *the most appropriate* way to pursue that purpose, given the tight fit between the State's compelling interest in punishing

those who violate the law and requiring felons to complete their punishment before voting. Indeed, Amendment 4 and SB-7066 would satisfy even *strict scrutiny* because they are narrowly tailored to a compelling government interest.

Plaintiffs also go astray when they insist that under rational-basis review the relevant question "is whether the [payment] requirement is rational *as applied to Plaintiffs*, who cannot afford to pay." Gruver Br. 57. Absent an underlying discriminatory purpose, the question is whether the law's *classification* is rational. *See, e.g.*, *Estrada v. Becker*, 917 F.3d 1298, 1310 (11th Cir. 2019). And classifications can be "*significantly* over-inclusive or under-inclusive." *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001) (emphasis added). In fact, although "[n]early any statute which classifies people may be irrational as applied in particular cases," *Beller v. Middendorf*, 632 F.2d 788, 808 n.20 (9th Cir. 1980) (Kennedy, J.), that does not mean they all fail rational-basis review.

Therefore, even if the State did not have a rational basis for demanding justice from those who cannot fully right their wrongs, that would not show that there is no "reasonably *conceivable* state of facts that could provide a rational basis for" the more general classification SB-7066 draws between those felons who complete their sentences and those who do not. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added). As explained in Appellants' opening brief, interests such as the administrative burdens of sorting those who can pay from those who genuinely

cannot as well as the preference for a bright-line rule independently justify the line drawn in Amendment 4 and SB-7066. *See* Appellants' Br. 27–32.

Finally, although SB-7066 standing alone survives rational-basis review, its payment requirements do not exist in a vacuum. Appellants' principal brief catalogued the ways in which many felons unable to pay outstanding fines, restitution, and fees could nevertheless regain their right to vote through other means. *Id.* at 31–32. Plaintiffs take issue with these alternative avenues not being "equally accessible" to automatic restoration. Gruver Br. 46 (quoting App. 507); *see* Raysor Br. 25–27. But this "equal-accessibility" standard assumes the correctness of Plaintiffs' arguments justifying heightened scrutiny. Rather, absent an exception, "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *San Antonio*, 411 U.S. at 24.

Moreover, Plaintiffs argue (Gruver Br. 49; Raysor Br. 26) that executive clemency does not provide felons with a meaningful opportunity to restore their voting rights, in part, because payment of restitution is required. But as of January 21, 2020, the Clemency Board has voted to remove this requirement for the restoration of civil rights with a hearing. *See* FLA. R. EXEC. CLEMENCY 5(E), 10(A) (2020), https://bit.ly/30JlFBm. Therefore, in all meaningful respects, the State's clemency rules are now the same as those in *Johnson*, which this Court held meant

that the State "does not deny access to the restoration of the franchise based on ability to pay." 405 F.3d at 1216–17 n.1. So apart from supporting the existence of a conceivable state of facts justifying SB-7066, the State's changes to the clemency rules should obviate any need for the Court even to consider the merits of Plaintiffs' wealth-discrimination claim. Thus, if *Johnson* has any bearing on this case, it only provides additional support for Appellants.

II. Plaintiffs Are Not Legally Entitled To A Partial Injunction.

Even if Plaintiffs were likely to succeed on the merits of their equal-protection claim, they cannot show that they are legally entitled to the district court's partial injunction. Under Florida's settled severability principles, the condition that felons complete "all terms of sentence" cannot be severed from Amendment 4, requiring the wholesale invalidation of Amendment 4 if Plaintiffs are correct on the merits.

A. Plaintiffs' claim triggers severability analysis.

1. Plaintiffs do not, and cannot, cite a single case stating that severability analysis is inappropriate for as-applied challenges. In fact, the Supreme Court has said the opposite. In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), the Court explained that "[a]fter finding an *application* or portion of a statute unconstitutional, [the court] must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Id.* at 330 (emphasis added). Likewise, in *United States v. Booker*, 543 U.S. 220 (2005), the Court, relying

partially on Justice Thomas's dissent, explained that "sometimes severability questions . . . can arise when a legislatively unforeseen constitutional problem requires modification of a statutory provision as applied in a significant number of instances." *Id.* at 247. And in *Sloan v. Lemon*, 413 U.S. 825 (1973), the Court held that a statute providing for tuition reimbursement violated the Establishment Clause as applied to sectarian schools and *struck down the statute in full, even as applied to non-sectarian schools*. *See id.* at 833–34. This Court has also addressed severability in as-applied challenges. *See, e.g.*, *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 461 (11th Cir. 1996); *Smith v. Butterworth*, 866 F.2d 1318, 1320–21 (11th Cir. 1989), *aff'd*, 494 U.S. 624 (1990).

Further, in *none* of Plaintiffs' cases "grant[ing] relief on as-applied claims without engaging in severability analysis," Raysor Br. 44, did the Supreme Court *hold* that severability was inappropriate. Rather, the Court *did not even address severability*. *See M.L.B.*, 519 U.S. 102; *Bearden*, 461 U.S. 660; *Mayer*, 404 U.S. 189; *Boddie*, 401 U.S. 371; *Williams*, 399 U.S. 235; *Griffin*, 351 U.S. 12. The likely explanation is that the parties in those cases "did not bother" to raise the issue because "there was no arguable reason" not to sever. *Booker*, 543 U.S. at 322 (Thomas, J., dissenting). Whatever the reason, "questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be

considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

Finally, that this case involves an equal-protection claim does not inexorably require the Court to "extend[] the right to those excluded." Gruver Br. 71. As the Supreme Court explained in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), while the "preferred rule in the typical case is to extend favorable treatment," the ultimate inquiry is "governed by the legislature's intent, as revealed by the statute at hand." *Id.* at 1699, 1701. In *Morales-Santana*, this meant *not* extending the benefit, but rather striking it entirely. *See id.* at 1700. The same result should obtain here.

2. Plaintiffs also argue that the district court's ruling does not require severability analysis because the order "does not implicate the constitutionality of any provision of Amendment 4." Raysor Br. 46. But as the Florida Supreme Court recently held, Amendment 4's requirement that felons complete "all terms of sentence" "plainly encompasses not only durational terms *but also obligations and therefore includes all [financial obligations] imposed in conjunction with an adjudication of guilt*." *Implementation of Amendment 4*, 2020 WL 238556, at *9 (emphasis added). Allowing felons to vote who have *not* completed all financial aspects of their sentences plainly contravenes this requirement. Plaintiffs' assertions that the State could remedy the purported constitutional violation by not requiring "payment" of outstanding legal obligations ring hollow, as Plaintiffs have

consistently argued that such measures are inadequate paths for completing one's sentence and regaining the right to vote. *See* Raysor Br. 25–26.

B. Amendment 4's requirement that felons complete all terms of sentence is not severable.

Plaintiffs attempt to obfuscate the severability analysis by presenting the question as "whether Floridians' overall purpose in amending Article VI § 4 will be furthered even absent [a financial obligation] requirement *read into the text*." Raysor Br. 49 (emphasis added). But as the Florida Supreme Court held, the requirement is not "read into the text," but unambiguously present there. Thus, Plaintiffs do not address the obvious result of a severability analysis here: that to find Amendment 4 severable, a court would need to conclude that even after *substantially altering* the "all terms of sentence" language the amendment still accomplishes its purpose and that the People would have adopted it. *See Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1089 (Fla. 1987).

Plaintiffs argue that the overall purpose of Amendment 4 was to "end permanent disenfranchisement for the majority of Floridians with past convictions" (Raysor Br. 50) or simply to "end permanent disenfranchisement in Florida" (Gruver Br. 72). But these broad articulations of Amendment 4's purpose are refuted by the provision's plain text, which makes clear that the People of Florida sought to extend the franchise *only* to those felons who have paid their debt to society in full by completing "*all* terms" of their sentences. FLA. CONST. art. VI, § 4 (emphasis added).

This purpose would be undermined if felons who *have not* completed *all* terms of their sentences are entitled to vote.

Indeed, the district court's remedy does not *sever* any part of the Florida Constitution but rather effectively *writes additional language into it*. If the district court's decision is allowed to stand, Florida's Constitution effectively will read as follows, with the judicially-created language bolded: "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**, except the financial terms of sentence for those who are unable to pay such obligations**."

It is not simply *unclear* whether the People would have adopted this alternative Amendment 4, *see Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1269 n.16 (11th Cir. 2005), but rather is wholly *implausible* that they would have done so. Amendment 4 was a historic measure, enacted after nearly two centuries of broad prohibitions on felons voting in Florida. In relaxing this prohibition, the People made clear their intent that felons pay their debt to society in full before being extended eligibility to vote. Had the People known that they *could not* insist on this qualification in all circumstances—particularly given the large numbers of felons Plaintiffs insist cannot pay their criminal penalties in full—it is highly unlikely that they would have ratified Amendment 4. Indeed, as written, only

64.55% of voters supported Amendment 4—a mere 4.55% above the 60% threshold necessary under the constitutional amendment initiative process. *See* FLA. CONST. art. XI, § 5(e). There is simply no basis to conclude that Amendment 4 would have cleared the 60% threshold with one of its key provisions severely compromised. And supporters of Amendment 4 (including the Brennan Center) *knew* that felon reenfranchisement "polls higher" in Florida when payment of financial punishment was required and that there would be a "harder fight to win 60% + 1% approval" without that requirement. *See* Sec'y of State Suppl. App. 103, *Implementation of Amendment 4*, No. SC19-1341 (Fla. Oct. 3, 2019), http://bit.ly/flsctsuppappx.[4]

III. Appellants Concede That This Court Should Not Reach Plaintiffs' Twenty-Fourth Amendment Claim.

This court is not jurisdictionally *barred* from reaching the merits of Plaintiffs' Twenty-Fourth Amendment claim, *see Solantic*, 410 F.3d at 1272–73, and Appellants maintain that SB-7066 is not a poll tax for the reasons explained in our opening brief. But because Plaintiffs have not raised it as an alternative basis for affirmance, this Court should not exercise its discretion to reach this issue.

[4] State-court filings are judicially noticeable. *See Osheroff v. Humana, Inc.*, 776 F.3d 805, 811 n.4 (11th Cir. 2015).

IV. The Remaining Preliminary Injunction Factors Favor The State.

As often happens in cases like this, the propriety of a preliminary injunction ultimately "turns on the likelihood of success on the merits." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (cleaned up). Thus, once it is established that Plaintiffs are unlikely to succeed on the merits, their arguments on the other preliminary injunction factors fall like dominoes.

The cases Plaintiffs cite for the proposition that "[i]reparable injury is presumed when a restriction on the right to vote is at issue," Raysor Br. 52, all involved plaintiffs who were likely to succeed on the merits. *See Madera v. Detzner*, 325 F. Supp. 3d 1269, 1278 (N.D. Fla. 2018); *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1221 (N.D. Fla 2018). Even the district court recognized that "if a plaintiff is allowed to vote but it turns out the plaintiff is ineligible, the State will suffer irreparable harm." Suppl. App. 2165.

Further, because the State is a party, the balance of the harms and public interest considerations "are largely the same." *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010). Here, "the public interest lies in a correct application of the federal constitutional and statutory provisions upon which" Plaintiffs brought their claims, and "ultimately . . . upon the will of" Floridians "being effected in accordance with [state] law." *Coal. to Defend Affirmative Action*, 473 F.3d at 252 (cleaned up); *see* App. 529.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Dated: January 22, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of the Court's January 15, 2020 order partially granting Appellants' Motion To File Reply in Excess of Type-Volume Limitation because this brief contains 7,977 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: January 22, 2020

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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 January 22, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 22, 2020

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