No. 20-12003

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GOVERNOR OF FLORIDA, et al.,
Defendants-Appellants,
v.
KELVIN JONES, et al.,
Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Northern District of Florida
Case No. 4:19-cv-00300-RH-MJF

BRIEF OF ALABAMA, ARKANSAS, GEORGIA, KENTUCKY, LOUISIANA, MISSISSIPPI, NEBRASKA, SOUTH CAROLINA, and TEXAS AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR INITIAL HEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Eleventh Circuit Rule 26.1, undersigned counsel certifies that the Certificate of Interested Persons filed by Defendants-Appellants on February 26, 2019, are complete with the following exceptions:

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INTEREST OF AMICI CURIAE

Nearly every State in the Union has determined that people who commit certain serious crimes should forfeit their right to vote. Each of these States has also devised its own system for reextending to some felons their forfeited right. The *amici* States—Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, Nebraska, South Carolina, and Texas—have a substantial interest in ensuring that they can continue to pursue the goal of reenfranchisement alongside other important State interests like deterrence, restitution, and retribution.

The prior panel's decision in *Jones v. Governor of Florida*, 950 F.3d 795 (11th Cir. 2020) (per curiam), threatens those efforts because one factor many States—including all three States in this Circuit—consider before reenfranchising a felon is whether he has completed all the terms of his sentence, including serving prison time and paying fines and restitution. The panel would deem such considerations impermissible in many (if not most) cases, forcing States into an all-or-nothing choice—if felons who have greater means or who have committed less serious crimes can complete the financial terms of their sentences upon release and thereby obtain the franchise, then felons who are unable to immediately satisfy their debts to society must also "enjoy near-immediate, *automatic* re-enfranchisement." *Id.* at 826.

That holding constrains the States' options for pursuing reenfranchisement alongside other important criminal justice interests, and thus makes it more likely

that some States will pursue only the latter at the expense of the former. To avoid that unfortunate and unnecessary outcome, the en banc Court should hear this case and correct the errors of the prior panel and district court.

INTRODUCTION

States may "reasonably conclude that perpetrators of serious crimes should not take part in electing government officials," and they may "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 v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.). Thus, all States but two have imposed voting restrictions on at least some felons.[1] And while all States have some system for allowing some felons to be regain the franchise, most of those systems take into account whether the felon has completed *all* terms of his sentence, both carceral and financial.

The financial terms of a sentence can factor into the reenfranchisement process in one of three ways. First, some States explicitly require certain or all financial terms of a sentence to be satisfied. Second, some States have laws that allow for reenfranchisement when terms of a sentence are complete—language that is broad enough to include financial terms of a sentence. Finally, some States condition re-

[1] *See* Jennifer Rae Taylor, *Constitutionally Unprotected: Prison Slavery, Felon Disenfranchisement, and the Criminal Exception to Citizenship Rights*, 47 Gonz. L. Rev. 365, 392 (2012).

enfranchisement upon completion of parole or probation and then factor in payment of financial obligations when determining whether parole or probation will end. These varied systems reflect the differing policy concerns and values of diverse political communities, as each State strives to promote the goal of restoring voting rights alongside other important State interests like deterrence, restitution, and retribution.

The prior panel's reasoning would force many States to either abandon such important interests or shoulder substantial new burdens if they want to reenfranchise felons. A State that wishes to distinguish between felons who have and have not completed their entire sentences would have to develop new systems to determine whether felons with outstanding legal financial obligations (LFOs) were "genuinely unable to pay" them or had paid as much as they could up to that election. *Jones*, 950 F.3d at 832. And determinations that did not favor felons would likely spawn additional litigation over whether they really had the ability to satisfy more of their debt to their communities and victims.

If States are so limited in their ability to pursue reenfranchisement alongside other interests, some States may well throw in the towel and decide not to grant any disenfranchised felon the right to vote. Indeed, the panel deemed it "exceedingly unlikely that … the victims of crime would agree to forgo financial payouts—however unlikely their receipt may be—to allow the people who have victimized them

to be able to vote." *Id.* at 826. Voters and legislators considering whether to extend the franchise to felons who have not paid their debt to society may share similar moral intuitions. Fortunately, the Constitution does not put States to an all-or-nothing choice. Because the prior panel and district court concluded otherwise, the Court should hear this case en banc.

ARGUMENT

I. States have consistently and constitutionally required felons to complete their entire sentence before becoming eligible to vote.

While "it is well-settled that a state can disenfranchise convicted felons," even "permanently," *Hand v. Scott*, 888 F.3d 1206, 1213 (11th Cir. 2018), every State has at least one method by which felons can regain the right to vote. And a majority of States have an avenue for reenfranchisement that considers whether felons have satisfied all the terms of their sentence, including financial terms. Even so, no court—until now—has deemed such consideration unconstitutional. Because the prior panel's reasoning has far-reaching ramifications for the States, the en banc Court should hear this case.

The prior panel's reasoning would call into question the constitutionality of reenfranchisement statutes in a majority of States, reaching any statute that provides a benefit to felons who can satisfy financial terms of their sentences while requiring less pecunious felons to wait any longer. These concerns are not merely academic. Since 2016, Alabama has been defending its reenfranchisement system against

arguments that States cannot constitutionally require each felon to satisfy his entire sentence before regaining the franchise. *See Thompson v. Alabama*, No. 2:16-cv-783, Compl. at ¶¶245-252 (N.D. Ala. filed Sept. 26, 2016). And following the prior panel's holding in *Jones*, plaintiffs relied on that decision when seeking a preliminary injunction that would affect Alabama's August 2020 elections. *See Thompson*, No. 2:16-cv-783, doc. 215 at 31–32. That pending motion underscores the importance of the issues presented in this appeal.

So does the fact that Alabama and Florida are no outliers. As set forth in the addendum to this brief, six other States explicitly require fulfillment of financial terms of a sentence before a felon can take advantage of at least one avenue for reenfranchisement. And nine more States use broad language, such as requiring the "completion of the sentence," when delineating pre-registration requirements. In three of those States—including Georgia—such language has been interpreted to require that both carceral and financial terms of a sentence be satisfied before reenfranchisement. *See* Ga. Op. Att'y Gen. No. 84-33, 1984 WL 59904 (May 24, 1984) (interpreting the requirement for "completion of the sentence" in Ga. Const. Art. 2, §1, ¶III to include payment of fines included in a sentence).

The prior panel's novel holding would reach further still, as there are at least thirteen other States that require completion of probation, parole, or both before reenfranchisement and satisfying financial terms of a sentence is often a condition

for (1) completing probation or parole,[2] or (2) obtaining early release therefrom.[3] For instance, Missouri requires felons to complete only probation or parole before becoming eligible to vote, Mo. Ann. Stat. §115.133.2(2), but denies anyone release from probation or parole until all court-ordered restitution is complete, *id.* §559.105(2)-(3). Nebraska considers whether an individual has "paid all restitution, court costs, and fines in full" when determining whether to grant him early discharge from probation. *See* Neb. Sup. Ct. R. 6-1903. And many States, though not making LFO-fulfillment dispositive of discharge, make it a condition of parole or probation.[4]

A recently filed suit in North Carolina illustrates the far-reaching implications of the panel's reasoning. Plaintiffs there argue that because North Carolina's LFO-fulfillment condition could extend probation or parole (though only for a limited time), the potential delay in reenfranchisement means that "disenfranchisement

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[2] *See, e.g.*, N.M. Stat. Ann. §§1-4-27.1(B)(2), 31-13-1(A)(1), 31-21-10(E), (G) (disallowing felons from voting until they "complete[] all conditions" of parole, probation, or a suspended sentence and requiring payment of restitution and other costs to be conditions of parole).

[3] *See, e.g.*, N.J. Admin. Code §10A:71-6.9(a)(3) ("The appropriate Board panel may grant any parolee a complete discharge from parole prior to the expiration of the maximum term for which he or she was sentenced, provided that: … The parolee has made full payment of any assessment, fine, penalty, lab fee or restitution or the parolee has in good faith established a satisfactory payment schedule.").

[4] *See, e.g.*, N.C. Gen. Stat. Ann. §15A-1343(b)(4), (6), (9), (10) (listing required conditions of probation to include payment of child support, restitution, fines, and other costs and fees); Wis. Stat. Ann. §973.20(1r) ("Restitution ordered under this section is a condition of probation, extended supervision, or parole.").

persists solely because of a person's inability to pay court fees." Am.Compl. at 1, 19 *Cty. Success Initiative v. Moore*, No. 19-cv-15941 (N.C. Super. Ct. filed Dec. 3, 2019). Or, in the panel's words, "felons who are able to pay enjoy near-immediate, *automatic* re-enfranchisement as of right," while those who are still on probation do not. *Jones*, 950 F.3d at 826.

The same is true in most, if not all, of the reenfranchisement systems that require more than just release from prison before regaining the right to vote. And because the prior panel's reasoning creates a circuit split, departs from other decisions of this Court, *see* Pet.8-17, and calls into question the constitutionality of reenfranchisement systems in most States, the Court should review this case en banc.

II. The prior panel's decision will substantially burden States or lead them to curtail reenfranchisement efforts.

The prior panel's outlier decision will put States to one of three unenviable choices: (1) expend substantial resources to create a system for separating felons who are "genuinely unable to pay their LFOs" from those who are able, *Jones*, 950 F.3d at 826-27; (2) abandon their substantial interests in having felons fulfill their sentences before being granted the franchise;[5] or (3) scale back reenfranchisement efforts for all felons.

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[5] The prior panel declared that "the State has no deterrence interest" in requiring felons with limited means to complete financial terms of a sentence because "[t]hese felons have already committed their crimes …. The State cannot deter what has already happened." *Jones*, 950 F.3d at 827. That can't be right, for such "what's done

Based on the prior panel's opinion, a felon might argue that he is genuinely unable to pay his LFOs if he cannot obtain the requisite funds between his release from prison and the next election. After all, the panel rejected as inadequate systems "for rights-restoration … during which otherwise-eligible felons may miss many opportunities to vote." *Id.* at 826. Thus, if "felons who are able to pay enjoy near-immediate, *automatic* re-enfranchisement," then felons who are not able to pay today cannot be made to wait to receive the same benefits. *Id.*

Under such a rule, States could perhaps require felons to meet their obligations as far as they are able for each election, but no further, as a condition of reenfranchisement. For instance, a felon who owes $5,000 of restitution to his victim, but has the ability to pay only $1,000 before the next election, could possibly be required to pay that lesser amount, but no more, before being allowed to vote. And perhaps the State could make the voting-right grant good for one election only, as the felon might obtain more money before the next election.

But determining genuine inability to pay would be a difficult task (made more difficult still if it is recurring with each election). The inquiry would require a fact-intensive determination of the percentage of the LFOs a felon is able to satisfy before the next election. And the prior panel provides no guidance on that standard. For

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is done" reasoning would suggest that *any* sentence always comes too late to deter misconduct. But, of course, States sentence defendants not to deter what they already did, but to deter *future* misconduct by them and others.

example, would the assessment be based only on actual assets? Or also on income imputed based on ability to work? Would a voluntary reduction in pay reduce the fulfillment obligation? What about expenditures on goods or services that a State might not deem essential? While these and similar questions may have answers, it is easy to foresee numerous rounds of litigation over such standards and their application.

With these burdens in mind, it is important to remember that States are not required to allow any convicted felons to vote—ever. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). Thus, if forced to choose between (1) allowing essentially all felons to vote regardless of whether they have completed their sentences, or (2) creating and implementing systems for determining whether felons have been sufficiently genuine in their attempts to repay their victims, some States may opt for the third way of simply curtailing reenfranchisement efforts. For if the "overwhelming majority of felons have substantial unpaid financial obligations," *Jones*, 950 F.3d at 816, and States may "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, States may also rationally conclude that it is unwise or unfair to adopt the system this Court would foist on Florida.

That result would be unfortunate, though not unforeseeable. Rather than force such a choice on States, the en banc Court should grant the petition and join the other courts that have affirmed that the Constitution allows States to do what most States have already done.

III. If Florida's law violates the Equal Protection Clause, Florida should determine whether to level up or level down.

Even if Florida's reenfranchisement method violates the Equal Protection Clause, the approach of the prior panel and district court to remedying the violation conflicts with Supreme Court precedent. As the Supreme Court recently reiterated, "[w]hen the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017) (quotation marks omitted). And "[b]ecause the manner in which a State eliminates discrimination 'is an issue of state law,' upon finding state statutes constitutionally infirm, [the Supreme Court] ha[s] generally remanded to permit state courts to choose between extension and invalidation." *Id.* at 1698 n.23 (quoting *Stanton v. Stanton,* 421 U.S. 7, 18 (1975)).[6] Thus, rather than decide this policy issue for Florida, the Court should "leave it to [the State] to select" how to remedy the purported problem with its law,

[6] That the plaintiffs have not sought invalidation "does not restrain the Court's judgment." *Morales-Santana*, 137 S. Ct. at 1701 n.29.

id. at 1686, or at a minimum, certify this question of state law to the Florida Supreme Court.

CONCLUSION

This Court should grant the petition for initial hearing en banc.

Respectfully submitted this 9th day of June, 2020.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 9, 2020, I filed the foregoing motion electronically using the Court's CM/ECF system, which will serve all counsel of record.

s/Edmund G. LaCour Jr.
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Solicitor General

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I hereby certify that that this document complies with the type-volume limits of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,528 words.

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s/Edmund G. LaCour Jr.
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ADDENDUM

States with a Reenfranchisement Method That Explicitly Requires Some LFOs Be Met[1]	States with Reenfranchisement Method Language Broad Enough to Require LFOs Be Met[2]	States with a Reenfranchisement Method that Requires Completion of Probation or Parole[3]
Alabama	Georgia[a]	Alaska
Arizona	Iowa[4]	California
Arkansas	Kansas[a]	Delaware
Connecticut	Nebraska	Idaho
Florida	New Mexico	Kansas
Kentucky	Virginia[5]	Louisiana[6]
Tennessee[7]	West Virginia[8]	Minnesota
Texas[9]	Wisconsin	Mississippi
	Wyoming	Missouri
		Nebraska
		New Jersey
		New Mexico
		New York[10]
		North Carolina
		South Carolina
		South Dakota
		Texas
		Virginia
		West Virginia
		Wisconsin
		Wyoming

[a] In these States, the language has been interpreted to independently require a person to meet his LFOs before regaining his right to vote.

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[1] Ala. Code §15-22-36.1(a)(3); Ariz. Rev. Stat. §13-907; Ark. Const. amend. LI, §11(d)(2)(A), (C), (D); Conn. Gen. Stat. Ann. §9-46a(a); Fla. Const. art. VI, §4; Fla. Stat. Ann. §98.0751(2)(a); Ky. Rev. Stat. Ann. §196.045(2)(c); Tenn. Code Ann. §40-29-202(b); Tex. Elec. Code Ann. §11.002(a)(4)(A); Tex. Code Crim. Proc. Ann. art. 43.01(a).

[2] Ga. Code Ann. §21-2-216(b); Ga. Op. Att'y Gen. No. 84-33, 1984 WL 59904 (May 24, 1984) (interpreting the requirement for "completion of the sentence" in

Ga. Const. Art. 2, §1, ¶III to include payment of fines included in a sentence); Iowa Code Ann. §914.2; Kan. Stat. Ann. §21-6613(a), (b); *see* Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 Vand. L. Rev. 55, 180 n.44 (2019) (reporting that the Assistant Director of Elections for the Kansas Secretary of State has interpreted Kansas's statute to include full payment of LFOs); Neb. Rev. Stat. Ann. §29-112; N.M. Stat. Ann. §31-13-1(A)(1); Va. Code Ann. §53.1-231.2; W. Va. Code Ann. §3-2-2(b); W. Va. Const. art. IV, §1; Wisc. Stat. Ann. §304.078(3); Wyo. Stat. Ann. §7-13-105(b)(iii).

[3] Alaska Stat. Ann. §§12.55.185(18), 15.05.030(a); Cal. Const. art. II, §4; Cal. Elec. Code §2101; Del. Code Ann. tit. 15, §§6102, 6104; Idaho Code Ann. §18-310; Kan. Stat. §§21-6607(b)(7), 21-6607(b)(13), 22-3717(d)(5)(m), -3722; Kan. Admin. Regs. §45-1000-1; La. Const. art. I, §10; La. Stat. Ann. §18.2(8); Minn. Stat. Ann. §609.165(1) & notes; Miss. Code §§23-15-11, 47-7-35(1)(h), 47-7-37(1), 47-7-38(1), 47-7-41; Miss. Op. Atty. Gen. No. 2000-0473, 2000 WL 1511821; Mo. Ann. Stat. §115.133.2(2); Neb. Rev. Stat. Ann. §§29-112, 29-2263(1), (2), 29-2264(1); N.J. Stat. Ann. §19:4-1(8); N.M. Stat. Ann. §31-13-1(A); N.Y. Elec. Law §5-106(2); N.C. Gen. Stat. Ann. §13-1; S.C. Code Ann. §7-5-120; S.D. Codified Laws §§12-4-18, 23A-27-35, 24-5-2, 24-15A-7; Tex. Elec. Code Ann. §11.002(a)(4)(A); Tex. Code Crim. Proc. Ann. art. 43.01(a); Va. Code Ann. §§19.2-305, 53.1-231.2; W. Va. Code §§3-2-2(b), 62-12-9, 62-12-11, 62-12-17; Wis. Stat. Ann. §304.078(3); Wyo. Stat. Ann. §7-13-105(b)(ii).

[4] Voting rights can only be restored through a pardon by the Governor. *See* Iowa Code Ann. §914.2. A felon cannot apply for a pardon unless his LFOs are paid in full or he is faithfully following a court-ordered payment plan. And regarding consideration of a pardon application, the current policy states, "the payment of restitution … is an important component in determining if the restoration of rights of citizenship is appropriate" and "offenders ought to fulfill their financial obligations to pay court costs and fines, and the restoration of the rights of citizenship process can serve to address the problem of unpaid obligations." Iowa Exec. Order No. 70 (2011).

[5] Past administrations have required felons to fulfill all their LFOs before considering a reinstatement of voting rights, *see* Press Release, Va. Office of the Governor, Governor McAuliffe Announces Changes to Va.'s Restoration of Rights Policy, https://felonvoting.procon.org/sourcefiles/mcauliffe-changes-to-virginia-restoration-of-rights.pdf, but the current administration does not, *see* Sec'y of the Commonwealth of Va., Restoration of Rights Process, https://www.restore.virginia.gov/restoration-of-rights-process/.

[6] As of March 1, 2019, felons who have not been actually imprisoned for five years or more may vote, even if they are still on probation or parole. *See* La. Stat. Ann. §18:102(A)(1)(b).

[7] Tennessee also requires that the applicant be current on all child-support payments. *See Johnson v. Bredsen*, 624 F.3d 742, 745, 750–51 (6th Cir. 2010).

[8] The West Virginia Supreme Court has interpreted this to mean "that after completing the punishment fixed by judgment, a person convicted … can again vote." *State ex rel. Wolfe v. King*, 191 W. Va. 142, 145 (W. Va. 1994) (citing *Osborne v. Kanawha County Court*, 68 W. Va. 189 (W. Va. 1910)). *Osborne* describes "completing the punishment fixed by judgment" as "when he has suffered the penalty, he has paid the debt, [and] the sentence has spent its force." *Osborne*, 68 W. Va. at 470; *cf. King*, 191 W. Va. at 145 (analogizing to the restoration of the right to vote and then holding "that a convicted felon who has completed the sentence and paid all fines set by the judgement of the court is considered to be a credible person for the purpose of the service of process").

[9] Three other States—Delaware, Nevada, and Washington—had LFO-fulfillment requirements that were removed within the last three and a half years. The Washington Supreme Court upheld Washington's previous scheme under both the State and federal constitutions, *see Madison v. State*, 161 Wash. 2d 85, 110 (Wash. 2010), and Washington now provisionally grants felons voting rights upon release but revokes that grant if the felons subsequently fail to meet their financial obligations, *see* Wash. Rev. Code Ann. §29A.08.520.

[10] The Governor issued an executive order in 2018, which created a system in which parolees "w[ould] be given consideration [each month] for a conditional pardon that w[ould] restore voting rights without undue delay." N.Y. Exec. Order No. 181 (2018).