No. 19A1071

IN THE

# Supreme Court of the United States

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BONNIE RAYSOR, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Applicants*,

v.

RON DESANTIS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF FLORIDA, *ET AL.*,

*Respondents.*

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## REPLY TO RESPONDENTS' OPPOSITION TO THE APPLICATION TO VACATE THE ELEVENTH CIRCUIT'S STAY

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

*Counsel for Gruver Applicants*

Nancy G. Abudu
Caren E. Short
Southern Poverty Law Center
P.O. Box 1287
Decatur, Ga 30031

*Counsel for McCoy Applicants*

Paul M. Smith
*Counsel of Record*
Danielle M. Lang
Mark P. Gaber
Molly E. Danahy
Jonathan M. Diaz
Campaign Legal Center
1101 14th St. NW, Ste. 400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegal.org

*Counsel for Raysor Applicants and Plaintiff Class*


*Additional Counsel Listed on Inside Cover*

David D. Cole
American Civil Liberties Union
Foundation, Inc.
915 15th St. NW
Washington, DC 20005

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

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

Jennifer A. Holmes
NAACP Legal Defense and
Educational Fund, Inc.
700 14th St., Ste. 600
Washington D.C. 20005

*Counsel for Gruver Applicants*

Chad W. Dunn
Brazil & Dunn
1200 Brickell Ave., Ste. 1950
Miami, FL 33131

*Counsel for Raysor Applicants and Plaintiff Class*

Daniel Tilley
Anton Marino
American Civil Liberties Union
Foundation of Florida
4343 West Flagler St., Ste. 400
Miami, FL 33134

Pietro Signoracci
David Giller
Paul, Weiss, Rifkind, Wharton &
Garrison LLP
1285 Avenue of the Americas
New York, NY 10019

*Counsel for Gruver Applicants*

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## INTRODUCTION

"Vague laws invite arbitrary power." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring). Conditioning voting on financial obligations that are unknown, and cannot be determined with diligence, is unconstitutional. For voters to obtain any process from the State to determine their eligibility, they must first register and be identified as potentially ineligible because of outstanding legal financial obligations ("LFOs"), then wait for the state to review their LFO obligations.[1] Yet the State has "completed its review of not a single registration" of 85,000 registered voters; its review will not be completed until 2026 at the earliest, at the current rate of processing. *Jones v. DeSantis*, No. 4:19-cv-30-RH/MJF, 2020 WL 2618062, at *44 (N.D. Fla. May 24, 2020). And this does not address the hundreds of thousands of citizens who avoid registering altogether because the State threatens them with criminal prosecution for affirming the eligibility they cannot determine.

In other words, the State's plan is to "leav[e] people in the dark about what the law demands and allow[ ] [local elections officials] to make it up." *Dimaya*, 138 S. Ct. at 1224 (Gorsuch, J., concurring). Florida's faulty solution uses each individual election official's subjective belief of a citizen's credibility as the metric, under threat

[1] The Director of the Division of Elections testified at trial that for those who do not know whether, or how much, they must pay to vote,

> the Supervisor of Elections would make [a] determination *whether they find that individual credible and reliable and believe the testimony* that they have said. . . . In my opinion, *if I found the person credible*, . . . I would say, yes, that person can [vote]. Now, do they still owe those—those financial obligations to the clerk of the court? Yes, but that's not my concern.

Trial Tr. at 1203-05 (emphasis added).

of prosecution, regarding each individual's voter eligibility. "[T]he Constitution demands more." *Id*.

In the middle of absentee balloting for the August primary, days before a registration deadline, and four months after allowing the panel's decision affirming the preliminary injunction to remain in effect, *this* is what the Eleventh Circuit stay has resurrected. This Court usually affords deference to interim decisions of *en banc* courts of appeals. Undoubtedly that is because *en banc* courts usually act to quell, not create, confusion and chaos. This case is the exception.

The Court should reject the State's invitation to turn the *Purcell* principle into a one-way ratchet, and to project the Eleventh Circuit's violation of that principle onto the district court. The district court issued a thorough opinion on the merits, following Supreme Court and Circuit precedent, with all due speed and well before the August primary's deadlines. The Court should likewise reject the State's merits arguments, which boil down to this: the Constitution has nothing to say about an electoral standard that requires payment of an amount of money the State cannot determine (with the threat of prosecution for a wrong guess), that vanishingly few can afford, and that is a tax by another name. This Court's precedent compels vacatur of the stay.

## ARGUMENT

### I. *Purcell* Requires Vacatur.

This case matches *Purcell*'s circumstances to a tee—just with exponentially more confusion coupled with a standardless threat of criminal prosecution. The *en*

*banc* court changed the rules in the middle of an election (after mail-in ballot requests were received and in process for delivery or already delivered); it entered a "conflicting order[ ]" with *itself*; it "failed to provide any factual findings or indeed any reasoning of its own," leaving this Court to compare its "bare order" to the district court's "ultimate findings"; it gave "no indication" that it considered the district court's factual findings "to which [it] owed deference"; and its order leaves thousands of voters who have paid all they owe but cannot prove it because of the State's dismal recordkeeping "confus[ed]" and with the "consequent incentive to remain away from the polls."[2] *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006). Looming over these voters is the threat of prosecution. On the latter score, the Director of the Division of Elections says this: "I don't expect we're going to have many cases [where the person gets prosecuted] like that." Trial Tr. at 1206. Small comfort to those who have come straight with the law, wish to stay that way, and seek only clarity that they can vote.

The State ignores all of this, and focuses instead on a single difference: here, the district court remedied a constitutional violation, whereas in *Purcell* the district

[2] The State attacks those who registered to vote prior to the district court's entry of judgment on the merits, assuming they are all ineligible. Opp. at 13 n.1. This ignores the fact that tens of thousands have paid what they owe, but the State haphazardly records—or categorically does not record (*e.g.*, restitution)—their payments, making proof of eligibility impossible. It also ignores the fact that the State knew its citizens did not understand that there *was* any pay-to-vote requirement prior to SB 7066 going into effect. As such, the State provided those who registered during the six-month period between the effective date of Amendment 4 and the effective date of SB 7066 with safe harbor from prosecution for registering. *See* Fla. Stat. § 104.011(3). But it has not removed any of those voters from the rolls based on outstanding LFOs, and has not offered them any such safe harbor if they vote, whether in reliance on their still-valid registration status or their receipt of an absentee ballot requested while the district court's order was in effect. Finally, it ignores the fact that the State's lawyers *repeatedly* said in open court that people who were unsure of their eligibility should just go ahead and register, only to repeatedly contradict themselves minutes later. *See, e.g.*, Trial Tr. at 236-37 (Judge Hinkle, commenting that "[t]he last time the State of Florida told me that, after the next break you had to come back and say, Oh, no, that's not what we meant at all.").

court denied relief and the court of appeals imposed it. Opp. at 11-13. But *Purcell* is not a one-way ratchet disapproving only last-minute vindications, but not last-minute restrictions, on voting rights. If it were, this Court could have issued a much shorter opinion and left out the emphasis on deferring to the district court factfinding and requiring courts of appeals to explain their eve-of-election actions. This Court has never adopted the State's "one-way ratchet" version of the *Purcell* principle. *See, e.g.*, *Frank v. Walker*, 574 U.S. 929 (2014) (Mem.) (vacating eve-of-election stay of district court's injunction).

The State rests its argument on *Republican National Committee v. Democratic National Committee* ("*RNC*"), where this Court stayed the district court's entry, *five days* before an election, of relief "that the plaintiffs themselves did not see the need to ask for." 140 S. Ct. 1205, 1207 (2020). Here, the district court issued a preliminary injunction last October, which the Eleventh Circuit affirmed in February and declined to rehear *en banc* in March, and then issued final judgment on May 24—three months before the August primary, and two months before the registration deadline. That is a far cry from the five days in *RNC*.

Indeed, the district court consulted with the parties on a schedule that would allow for the orderly administration of elections. *See, e.g.,* Oct. 8, 2019, Hr'g Tr. at 302-305, ECF No. 205 (discussing interaction of trial date with election schedule). The State never indicated that the trial schedule would create *Purcell* problems in the case of an injunction. *Id.* Instead, the State repeatedly told the Court that rather than applying the preliminary injunction to all affected Florida voters immediately,

it was making plans and would be prepared to do so if they did not succeed at trial. *See, e.g.,* Mar. 26, 2020 Hr'g Tr. at 44:2-4, ECF No. 310 (counsel for State asserting that "The state is working diligently every day. The state will have a process. The state has contingencies planned for if the courts go one way, or the courts go another way."). The district court granted class certification on April 7, 2020. ECF No. 321. That order was not appealed. Given that the Eleventh Circuit already upheld the wealth discrimination claim, the State could have had no illusions that the final remedy would require an ability to pay mechanism and apply to the class. The State's characterization of the district court's injunction as a "last-minute order" is inaccurate.[3] Opp. at 12. Rather, it was the *en banc* Eleventh Circuit's "bare order" over a month later, in the midst of absentee balloting and on the eve of the registration deadline, and after declining to rehear the case four months earlier, that came at the eleventh hour. *Purcell*, 549 U.S. at 8.

This is not a case about a last-minute order changing the type of identification a voter must bring to the polls. It is about the State's inability to determine who is and is not eligible to vote, under the threat of criminal prosecution for such voters if they guess wrong, and the outright denial of the franchise to those whose sole barrier is their lack of wealth. The district court followed this Court's precedent, and the Eleventh Circuit's precedent *in this case*, to provide "clear guidance" that resolved the

[3] Indeed, it is difficult to see how Applicants—who filed suit mere hours after SB 7066 went into effect—could have moved any faster to vindicate their rights. And it is near impossible to believe the district court—which shepherded this case through preliminary injunction, a collateral proceeding at the Florida Supreme Court, appeal to the Eleventh Circuit on the preliminary injunction, and a virtual trial in the midst of a global pandemic—could have issued a final judgment any faster than it did here, less than eleven months after the case was filed.

mess the State created. *Purcell*, 549 U.S. at 8. The *en banc* court multiplied that mess with an unexplained stay during the absentee voting process. *Purcell* compels vacatur of the stay.

## II. The State's Due Process and Vagueness Arguments Are Meritless.

The State's arguments in response to the due process and vagueness claims are meritless. The State does not dispute that it failed to challenge the district court's due process and vagueness rulings in its stay motions below, instead it contends that (1) it was enough to challenge the remedy on *wealth discrimination* grounds, (2) the ruling was "cryptic," (3) the risk of erroneous deprivation is "unproven," (4) there is little risk of prosecution, and (5) the remedy was too broad. Opp. at 48-52. These arguments are meritless, but the fact they are being made for the first time in *this Court* means they are waived at this stage. The Court should vacate the stay, at least as to the claims not subject to the State's motions below.[4]

*First*, the State conflates Plaintiffs' wealth discrimination and due process/vagueness claims. Based upon Plaintiffs' due process/vagueness claims, the district ruled that "[t]he requirement to pay, as a condition of voting, amounts that are unknown and cannot be determined with diligence is unconstitutional." *Jones*,

[4] A party's failure to seek relief below is a "critical point" in this Court's analysis of whether a stay is merited. *See RNC*, 140 S. Ct. at 1206. In *RNC* this Court concluded that the "critical point in the case" was that the lower court had granted relief to a party that the party had not requested. 140 S. Ct. at 1206. That is precisely what the Eleventh Circuit did here. The State did not ask either the district court or the Eleventh Circuit to stay its due process, vagueness, and NVRA rulings; the State assumes the Circuit did so *sua sponte*. Just as the issuance of unsought relief in *RNC* compelled this Court to issue a stay, so too here it compels vacatur of the Eleventh Circuit's stay regarding these claims. Indeed, not only did Eleventh Circuit fail to follow "accepted standards in deciding to issue [a] stay." *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers), it offered no explanation whatsoever for its actions.

2020 WL 2618062 at *44. The State acknowledged in its brief below that this ruling was exclusively about due process/vagueness, and had nothing to do with wealth discrimination. *See* State's Brief at 46, *Jones v. DeSantis*, No. 20-12003 (11th Cir. June 19, 2020) (admitting that this ruling "sounds in due-process" and is "unrelated to its wealth-discrimination analysis"). As a remedy for this violation, the district court ruled that voters could request advisory opinions from the Division of Elections, and if they were not provided with an answer within 21 days, they would have a safe harbor to register and vote until informed of what, if anything, they owed. *Id.* at *44-45.

Reversing course, the State now says this process was adopted exclusively as a wealth discrimination remedy. Opp. at 48-49. Not so. The district court used the same mechanism—the advisory opinion process *suggested* by the State—to facilitate the remedy but they serve distinct remedial purposes. The State has to tell people what, if anything, they owe for two reasons: (1) due process and vagueness principles require notice and an opportunity to be heard before a deprivation of the franchise, *and* (2) in order for a person to determine if they are able, or unable, to afford their LFOs, they first must know how much they owe. The State trained its stay arguments exclusively on the merits of the wealth discrimination claim, and did not mention the words "due process" or "vagueness" in its stay motions to either court below. A party cannot obtain a stay of injunctive relief supported by two separate legal claims by attacking just one of those legal claims.

*Second*, the State feigns surprise that there was a due process and vagueness ruling by the district court, calling its decision "cryptic" and saying "[t]o the extent" it ruled on due process, that was in error. Opp. at 49-50. But it acknowledged the ruling in its brief below, and for good reason. The district court repeatedly addressed the due process issues, and its holding is clear. The court expressly ruled that requiring payment of unknown or unknowable variables as a condition of voting violates the Constitution. Moreover, it analyzed the claims at length (after previously addressing the State's inability to administer the system at length), and then observed that a *distinct remedy* was not needed for these claims because "[i]f implemented in a timely manner with adequate, intelligible notice, the advisory-opinion procedure and attendant immunity will *satisfy due process* and *remedy the vagueness* attending application of the criminal statutes." *Jones*, 2020 WL 2618062, at *37 (emphasis added). The court then observed that this same relief would have to be ordered "even in the absence of a ruling for the plaintiffs on the vagueness and procedural-due-process claims," *id.*, because a person's ability to pay could not be determined without knowing how much the person owed. *Id.* From this, the State somehow concludes it prevailed and Plaintiffs lost this claim. But the court made its due process/vagueness ruling clear both in its opinion, *see id.* at *36-37, *44, and in its order denying the stay, Order Denying Stay at 5, 9, 11, ECF No. 431 (noting that State did not seek stay of due process/vagueness rulings). The State had no trouble

realizing it needed to appeal its due process/vagueness loss,[5] yet it chose to exclude these claims from its stay motion. The Eleventh Circuit was wrong to the extent it entered a stay that went beyond what the State requested.

*Third*, the State contends that the risk of erroneous deprivation "is unproven." Opp. at 51. The district court recounted the record evidence on this score at length in its opinion, but one example from a plaintiff in this case is illustrative. As is common, one plaintiff was convicted of both a misdemeanor and a felony; only the latter of which affects his ability to vote. As is also common in Florida, his judgment imposed a $1,000 fine without indicating to which conviction it attached. *See Jones*, 2020 WL 2618062, at *17. At trial, the Director of the Division of Elections could not determine whether he would have to pay that amount to vote, and she acknowledged that her staff had reviewed his file and did not spot the issue—"my staff is not going to know the subtleties of this particular thing." Trial Tr. at 1314. Yet her staff determines whether to recommend people for removal from the registration rolls because of outstanding LFOs.

If the State cannot determine whether this plaintiff—whose circumstance is far from unique—can vote, then how will a Floridian in the same position be able to do so? The Director of the Division of Elections was asked "[w]hat if the voter doesn't know and so can't swear?" Her response: "If I were in the voter's position, I don't know

[5] *See, e.g.*, State's *En Banc* Petition at 1, *Jones v. DeSantis*, No. 20-12003 (11th Cir. June 11, 2020) (including as one of three concerns in "Statement of Issues" "[w]hether the Due Process Clause requires the overhaul of Florida voter registration procedures ordered by the district court"); State's Brief at 44-49, *Jones v. DeSantis*, No. 20-12003 (11th Cir. June 19, 2020) (devoting entire section of brief to due process claim).

that I would be swearing under oath if I wasn't sure about that or had a true belief of that." Trial Tr. at 1381. This is not the process that is due. *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 351, 357 (1983) (noting that due process requires "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement").

*Fourth*, the State's contention that willfulness is the standard for a criminal conviction misses the point because (1) that is not what it tells citizens who are seeking to register and (2) registration requires an affirmative attestation to eligibility not just lack of knowledge of ineligibility. The state omits the willfulness standard from its voter registration form, *see* Application at 12-13, and the Director of the Division of Elections testified that applicants should not swear to their eligibility if they do not know they are eligible.

*Fifth*, the district court's remedy was properly tailored to the scope of the violation. The State contends that the district court "hijack[ed] the advisory opinion process," Opp. at 52, but the State in fact *suggested* the remedy the district court imposed. Here again is the Director of the Division of Elections, testifying about what those unaware of their outstanding LFOs should do: "It is certainly a challenge and something that we are trying to make sure if someone has a question that we can try to answer it, and that's why we offered up the advisory opinion, to see if that would give them some cover." Trial Tr. at 1381; *Jones*, 2020 WL 2618062, at *37. But the district court found that at the State's projected pace it would take six years or more

just to determine how much, if anything, those currently registered should pay. So the district court imposed a reasonable time period after which a person has a safe harbor until such time as deemed ineligible—21 days. The State's proposal of "wait six years" as election after election passes fails the tailoring test—not the district court's balanced and reasonable remedy.

## III. The State's Wealth Discrimination Arguments Are Meritless.

### A. Heightened Scrutiny Applies.

Heightened scrutiny applies to Plaintiffs' wealth discrimination claim. This conclusion is inescapable based on decades of this Court's precedent, which "solidly establish" this fact for at least two contexts: access to the franchise and administration of criminal justice. *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996). The State's arguments to the contrary are mere semantics.

*First*, the State dissects this Court's sweeping holding in *Harper v. Virginia State Board of Elections*: "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." 383 U.S. 663, 666 (1966). The State says "the payments a felon must make under SB-7066 were imposed as punishment for committing a felony; they are not 'fees' imposed as an 'electoral standard.'" Opp. at 28. But the constitutional problem is not that Florida imposes financial penalties upon criminal conviction; the constitutional problem is that SB-7066 *expressly makes payment of those financial penalties an electoral standard*. The statute is titled "Restoration of voting rights; termination of ineligibility subsequent to a felony

conviction." Fla. Stat. § 98.0751. The State does not explain how this is not an electoral standard.[6]

The State also contends that *Harper* is inapposite because Virginians were "'otherwise qualified' to vote under State law and the poll tax 'introduce[d] a capricious and irrelevant factor.'" Opp. at 28 (quoting *Harper*, 383 U.S. at 668) (bracket in original). But this proves Plaintiffs' point. The citizens affected by Florida's pay-to-vote scheme *are* otherwise qualified to vote—they meet every requirement to vote *except* the State's electoral standard of paying money—a factor which is capricious and irrelevant to the franchise.[7]

*Second*, the State seeks to avoid this Court's *Griffin-Bearden* line of cases by pulling them apart, confining each case to its precise facts, and pretending they are not based upon any cohesive principle. Opp. at 29-37. This Court has said otherwise. *See, e.g.*, *M.L.B.*, 519 U.S. at 124 ("But our cases solidly establish two exceptions," voting and criminal justice). After reciting each case's particular facts, the State sums it up with this: "departure from rational-basis review was justified in *Bearden* because '[d]ue process and equal protection principles converge' in that kind of case." Opp. at 33 (quoting *Bearden v. Georgia*, 461 U.S. 660, 665 (1983)). They do here too, as this case well illustrates. This case "ask[s] directly the due process question of

[6] The State worries that this makes *Harper* "boundless." Opp. at 28. Wherever *Harper*'s outer boundary lies, a law that makes wealth the decisive electoral standard separating eligible from ineligible fits comfortably within *Harper*'s purview.

[7] The State seeks to merge the punishment of having to pay LFOs and the punishment of disenfranchisement. People are not relieved from their obligation to pay their LFOs in the absence of a monetary electoral standard.

whether and when it is fundamentally unfair or arbitrary for the State to revoke [rights restoration] when an indigent is unable to pay the fine." Opp. at 34.

The State says *Bearden* is different because it involves a "vested" right to probation that cannot later be revoked, and here the right to vote only vests upon payment of LFOs. Opp. at 34. For this to be relevant, the Court would have to conclude that *Bearden*'s principle would not apply to a state law conditioning the *commencement* of probation on the payment of a fee a person cannot afford. Why would that matter to the constitutional analysis? The State does not explain.

*Third*, the State says *Bearden* does not apply because with probation, the State has concluded that the "outer limit" of the state's penological interests have been satisfied, whereas here the penological interest is not satisfied until LFOs are fully paid. Opp. at 35. But Florida does not care *who* pays a person's LFOs—it just expects a set sum of money in its coffers in exchange for the right to vote. What "penological interest" is served by a wealthy relative paying off a fine so a person can vote while a person without means remains disenfranchised? The State has no valid interest in punishing people for being poor and rewarding people for having wealthy relatives, least of all as an electoral standard.

### B. The Pay-to-Vote System Is Irrational.

Regardless of whether heightened scrutiny applies, the district court correctly concluded that Florida's pay-to-vote system is irrational. This is so because it is irrational to enact a requirement for rights restoration that the mine-run of people affected cannot meet. *See, e.g.*, *Califano v. Jobst*, 434 U.S. 47, 55 (1977) ("The broad

legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples."); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 316–17 (1976) (upholding as rational the mandatory retirement of police officers at age 50 without finding whether the measure was rational as applied to the plaintiff); *see also Vance v. Bradley*, 440 U.S. 93, 97 (1979). Doing so serves no goal other than to deny rights restoration to the majority of those who are intended to benefit. *See, e.g.*, *Jones*, 2020 WL 2618062 at *26 ("one cannot get blood from a turnip or money from a person unable to pay"). The State fails to grapple with this basic infirmity.

*First*, the State contends that this Court's endorsement of as-applied rational basis claims in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), does not apply because here the State did not engage in "irrational prejudice against those felons unable to pay the financial terms of their sentence." Opp. at 39. But the district court concluded that the State did precisely that, *see infra* Part III.C. That conclusion is not clearly erroneous.

*Second*, the State says the pay-to-vote system passes rational basis even though the vast majority cannot afford what they owe. Opp. at 42. For this, the State offers this bold idea: the State has an interest in premising the franchise on payment of money, "apart from collecting financial debts, lest it express the view that felons unable to complete their sentences deserve *special treatment*." Opp. at 42 (emphasis added). It is not "special treatment" to decouple voting from wealth. It is a constitutional command.

*Third*, the State defends its last-minute "first-dollar policy"—which leaves victims owed restitution unpaid and lines the pockets of the state and private collection firms—by saying private collection firms are part of the "society" to whom debt must be paid, but *crime victims are not*.[8] Opp. at 41. Florida has no legitimate basis to require a person to divest themselves of a sum of money, untethered to its purpose or payee, before allowing them to vote.

### C. The State's "Intent" Argument Is Wrong and Irrelevant.

The State's argument that Plaintiffs must prove that the State intended to discriminate on the basis of wealth is both legally wrong and factually irrelevant. It is legally wrong because this Court has squarely rejected this argument. *See M.L.B.*, 519 U.S. at 105. It is factually irrelevant because Plaintiffs *did* prove this, and the district court found as a fact that the legislature intended to discriminate on the basis of wealth. *See, e.g.*, Order Denying Stay at 8 (finding, *inter alia*, no reason for the State to require payment of amounts converted to civil liens—a process for taking the legal debt of those who cannot pay out of the criminal justice system—other than as "a system favoring those with money over those without"); *see also Jones*, 2020 WL 2618062, at *34 (concluding that inclusion of civil liens in SB 7066 discriminated against those unable to pay).

[8] The hypocrisy of the State's position is astounding. At the same time Governor DeSantis argues in this Court that the debt is paid despite a crime victim not seeing a dollar, he has justified this appeal to the public on the grounds that "If somebody gets robbed, they have a right to have restitution paid to them." Lawrence Mower, *DeSantis defends decision to appeal ruling in felon voting law, citing needs of victims*, Tampa Bay Times (June 19, 2020), https://www.tampabay.com/florida-politics/buzz/2020/06/19/gov-ron-desantis-defends-decision-to-appeal-ruling-in-felon-voting-law-citing-needs-of-victims/.

The State relies on semantics to attempt to distinguish *M.L.B.*, in which this Court highlighted voting as one of two "solidly establish[ed]" contexts meriting heightened scrutiny for wealth discrimination and held that intent need not be proved. 519 U.S. at 105. The State contends that *M.L.B.*'s "no intent requirement" was limited to "indigent" persons, while the Plaintiff Class in this case includes people who are not indigent, but who nonetheless have "outsized" LFOs they cannot afford to pay. Opp. at 23. The State says "indigency" does not "simply mean[ ] 'unable to pay.'" *Id.* at 24. But this Court used the word "indigency" and the phrase "ability to pay" interchangeably in the doctrine. *See, e.g.*, *M.L.B.*, 519 U.S. at 124 (noting that access to the franchise and criminal process cannot turn on "who can pay a license" or "ability to pay"). More to the point, this Court used the phrase "ability to pay" in the precise sentence in which it explained why there is no intent requirement. *Id.* at 127 (explaining that laws based on wealth "are wholly contingent on one's *ability to pay*, and thus visi[t] different consequences on two categories of persons, they apply to all indigents and do not reach anyone outside that class" (emphasis added) (citations omitted)). This Court's rhetorical choice to avoid repetition by using diverse phrases for the same concept in a single sentence did not create distinct constitutional standards. In any event, the State's argument makes no sense. Florida's pay-to-vote system precludes only those *unable to pay* and no one else. Someone skating just above the poverty line who owes $10,000 in LFOs is in the same boat as someone who is "indigent" but owes $1,000. The State offers no explanation for how the rights of these individuals to access the ballot are constitutionally distinct.

Regardless, the State's intent argument is irrelevant because the district court expressly found that the State intended to discriminate on the basis of wealth. First, it did so in its opinion. The court found that the legislature's choice to extend the pay-to-vote requirement to those whose LFOs were converted to civil liens was discriminatory. The court explained that the legislature debated whether to include civil liens, *Jones*, 2020 WL 2618062 at *31, that conversion to civil liens was a "longstanding practice" upon making an inability to pay determination, *id.* at *3, and that the legislature's inclusion of civil liens in its pay-to-vote system was discriminatory, *id.* at *34 ("LFOs are usually converted to civil liens when an individual is unable to pay. This order will end discrimination against those unable to pay . . . ."). The district court reiterated this finding in its order denying a stay. Order Denying Stay at 8 ("Why else did SB7066 prove that amounts converted to civil liens were still disqualifying? . . . A motive was to prefer those with money over those without. Lest there be any doubt, I now expressly so find.").[9]

## IV. The State's Twenty-Fourth Amendment Arguments Are Meritless.

### A. The Twenty-Fourth Amendment Applies to Rights Restoration.

The State concedes that rights restoration schemes are subject to constitutional scrutiny. *See* Opp. at 45. ("Respondents have never contended that the State is constitutionally unrestrained in the qualifications it can set for restoration.").

[9] The State objects that the district court was without jurisdiction to say as much in its order denying the stay. Opp. at 25 n.3. The court was merely reciting facts it had already found. This was a bench trial, and the district court was the finder of fact. The court has made its factual finding clear. What purpose would be served by remanding so the court can say it again?

Nonetheless, the State contends that the Twenty-Fourth Amendment does not prohibit conditioning rights restoration on the payment of a poll or other tax. Opp. at 44-45 (relying on *Richardson v. Ramirez*, 418 U.S. 24 (1974)).[10] To justify this apparent contradiction, the State appears to suggest that rights restoration schemes are subject to scrutiny *only* under the Equal Protection Clause, *see id*. (stating that a rights restoration scheme that applied only to white voters, to men, or to those over twenty-one would be unconstitutional because it would not "survive the appropriate level of scrutiny for their respective classifications"). This is an absurd proposition, which lacks any support in the text of the Constitution. The Fourteenth Amendment cannot allow what the *later* Amendments explicitly prohibit. *See* App. 38-39.

By the State's logic, § 2 of the Fourteenth Amendment renders the explicit protections offered to voters under the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments a nullity as applied to those with past felony convictions. Under this logic, a law that explicitly denied rights restoration to Black people would not violate the Fifteenth Amendment's blanket prohibition on "den[ying] or abridg[ing]" the right to vote "on account of race," U.S. Const. Amend XV, because "reenfranchisement schemes only *restore* voting rights" and thus "do not *disenfranchise* anyone." Opp. at 44. Nor would a law that explicitly denied rights restoration to women violate the Nineteenth Amendment's prohibition on "den[ying] or abridg[ing]" the right to vote "on account of sex," U.S. Const. Amend. XIX, because

[10] *Richardson* does not create a Constitution-free zone. *See* 418 U.S. at 56 (remanding for consideration of whether the rights restoration scheme at issue violated the Equal Protection Clause).

the scheme would only *enfranchise* not *disenfranchise*. And finally, there would be no claim that a law that explicitly denied rights restoration to those between eighteen and twenty-one violated the Twenty Sixth Amendment's prohibition on "den[ying] or abridg[ing]" the right to vote "on account of age," U.S. Const. Amend. XXVI, because the law only discriminates between whose rights will be restored, rather than whose will be taken away.

The limited provision in Section 2 of the Fourteenth Amendment authorizing criminal disenfranchisement is not so broad as render all other constitutional provisions a nullity in that context. *See Hunter v. Underwood*, 471 U.S. 222, 223 (1985) (Rehnquist, C.J.) ("§ 2 was not designed to permit the purposeful discrimination . . . which otherwise violates § 1 of the Fourteenth Amendment.").

### B. Florida's Court Fees and Costs Are "Other Taxes" Under the Twenty-Fourth Amendment.

The district court correctly found, based on the factual record developed at trial, that court fees and costs constitute taxes for the purpose of the Twenty-Fourth Amendment.[11] The State asserts—without more—that fees and costs are imposed as punishment for the conviction of a crime, and thus cannot be taxes. Opp. at 46. This Court has rejected such simple analysis in favor of a functional approach. *See NFIB*

[11] The State contends the district court "deviated from the established consensus of the courts of appeals" that outstanding court fees and costs are not "taxes" under the Twenty-Fourth Amendment. Opp. at 2 (citing *Johnson v. Bredesen*, 624 F.3d 742, 751 (6th Cir. 2010); *Harvey*, 605 F.3d 1067, 1080 (2010); *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000)). None of these cases involved a question as to court costs and fees, and none considered the application of the phrase "other tax." *Jones v. DeSantis*, 2020 WL 2618062 at *27; *see also id.* ("The amendment applies not just to any poll tax but also to any 'other tax.' As the State has emphasized in addressing Florida's Amendment 4, 'words matter.'").

*v. Sebelius*, 567 U.S. 519, 564-65 (2012); *cf. Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922) (acknowledging that whether the purpose of an exaction is punitive or remunerative "may be immaterial" to its status as a tax "where the sovereign enacting the law has power to impose both tax and penalty"). Indeed, as this Court recently noted, "state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue," *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019), "[p]erhaps because they are politically easier to impose than generally applicable taxes," *id.* Thus, it should come as no surprise that after applying the "functional" test laid out in *NFIB*,[12] the district court found as a matter of fact that "Florida has chosen to pay for its criminal justice system by assessing [fees and costs]" on criminal defendants, including those who are never adjudicated guilty, and that such assessments constitute "a tax by any other name." *Jones v. DeSantis*, 2020 WL 2618062 at *29.

"The Twenty-Fourth Amendment sought to prohibit the practice of "exact[ing] a price for the privilege of the franchise," which grew out of a "general repugnance to the disenfranchisement of the poor." *Harman v. Forssenius*, 380 U.S. 528, 539–40 (1965). And its expansive language is intended to "nullif[y] sophisticated as well as simple minded modes" of taxing prospective voters and extends to "equivalent or

[12] The district court found that fees and costs "are assessed regardless of whether a defendant is adjudged guilty, bear no relation to culpability, and are assessed for the sole or at least primary purpose of raising revenue to pay for government operations—for things the state must provide, such as a criminal justice system, or things the state chooses to provide, such as a victim compensation fund." *Jones*, 2020 WL 2618062, at *29. Further, they are "are ordinarily collected not through the criminal justice system but in the same way as civil debts or other taxes owed to the government, including by reference to a collection agency." *Id.* These factual findings are not clearly erroneous.

milder substitute[s]" for an explicit poll tax. *Id.* at 540–41. The district court correctly found that this prohibition applies to Florida's system of assessing user fees and costs on criminal defendants, and then denying the right to vote to those convicted until the exaction is paid.

## CONCLUSION

The Court should vacate the Eleventh Circuit's July 1, 2020 stay in full, or at the very least as to the NVRA and due process/vagueness claims upon which the State did not even request a stay.

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Respectfully submitted,


Julie A. Ebenstein
R. Orion Danjuma
Jonathan S. Topaz
Dale E. Ho
American Civil Liberties Union Foundation, Inc.
125 Broad Street, 18th Floor
New York, NY 10004

David D. Cole
American Civil Liberties Union Foundation, Inc.
915 15th St. NW
Washington, DC 20005

Sean Morales-Doyle
Eliza Sweren-Becker
Myrna Pérez
Wendy Weiser
Brennan Center for Justice at NYU School of Law
120 Broadway, Suite 1750
New York, NY 10271

Paul M. Smith
*Counsel of Record*
Danielle M. Lang
Mark P. Gaber
Molly E. Danahy
Jonathan M. Diaz
Campaign Legal Center
1101 14th Street NW, Ste. 400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegal.org

Chad W. Dunn
Brazil & Dunn
1200 Brickell Ave., Ste. 1950
Miami, FL 33131

*Counsel for Raysor Applicants and Plaintiff Class*

Sherrilyn Ifill
Janai S. Nelson
Samuel Spital
Leah C. Aden
John S. Cusick
NAACP Legal Defense and
Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006

Jennifer A. Holmes
NAACP Legal Defense and
Educational Fund, Inc.
700 14th Street, Suite 600
Washington, D.C. 20005

Daniel Tilley
Anton Marino
American Civil Liberties Union
Foundation of Florida
4343 West Flagler St., Suite 400
Miami, FL 33134

Pietro Signoracci
David Giller
Paul, Weiss, Rifkind,
Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019-6064

*Counsel for Gruver Applicants*

Nancy G. Abudu
Caren E. Short
Southern Poverty Law Center
P.O. Box 1287
Decatur, Georgia 30031-1287

*Counsel for McCoy Applicants*