IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

KELVIN LEON JONES, BONNIE RAYSOR, DIANE SHERRILL,
Individually and on behalf of others similarly situated,
JEFF GRUVER, EMORY MARQUIS MITCHELL, MARQ, *et al.*,

Plaintiffs-Appellees,

ROSEMARY MCCOY, SHEILA SINGLETON,

Plaintiffs-Appellees-Cross-Appellants,

JESSE D HAMILTON,

Plaintiff,

—v.—

GOVERNOR OF FLORIDA, FLORIDA SECRETARY OF STATE,

Defendants-Appellants-Cross-Appellees,

CRAIG LATIMER, In his official capacity as supervisor of elections of Hillsborough County Florida, an indispensable party, *et al.*,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR *AMICI CURIAE* TAX AND CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici Curiae certify that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Local Rules 26.1-1, 28-1(b), and 29-2, to the best of their knowledge.

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

Dated: August 3, 2020

/s/ David W. Rivkin
David W. Rivkin

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INTEREST OF AMICI CURIAE[1]

Amici curiae are tax law and constitutional law professors who have extensive experience teaching and practicing tax law and constitutional law. *Amici* have written numerous books and articles on taxation and constitutional law, including on state and local tax laws, and on the connection between taxes and political rights. *Amici* have no financial interest in the outcome of this case. This brief has been joined by individuals affiliated with various educational institutions, but does not purport to present any school's institutional view. Signers of this brief do so solely in their individual capacities, with institutional affiliations provided for identification purposes only.

SUMMARY OF THE ARGUMENT

The Twenty-Fourth Amendment to the United States Constitution prohibits a state from abridging a citizen's right to vote by imposing "any poll tax or other tax." U.S. Const. amend. XXIV. The District Court correctly ruled that certain fees imposed by the Florida statute at issue here functioned as taxes within the ambit of the Twenty-Fourth Amendment because they conditioned the exercise of the right to vote on the payment of funds to the government.

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 29(c)(5), counsel for *Amici* states that no counsel for a party authored this brief in whole or in part, and no person other than *Amici* or their counsel made a monetary contribution to its preparation or submission.

The District Court's conclusion is supported by the history and purpose of the Twenty-Fourth Amendment. Congress envisioned a broad interpretation of the meaning of "tax," and Supreme Court precedent construes the term to apply to a wide range of revenue-raising measures. For those reasons, *amici* urge the Court to apply the functional approach adopted by the Supreme Court and adopt a straightforward definition of "tax" that accords with the purposes of the Twenty-Fourth Amendment by focusing on whether the right to vote has been conditioned on an effort by the government to raise revenue.

Despite the history and purpose of the Amendment, and the lower court's sound analysis of its applicability here, Florida characterizes the financial obligations at issue as yet another component of criminal punishment. That characterization is incorrect, as those fees bear no relationship to the crimes charged and serve to raise revenue. Conditioning the right to vote on an individual's ability to meet this financial burden is exactly the sort of invidious monetary barrier to voting that the Twenty-Fourth Amendment disallowed. This Court should therefore find that that the Florida costs and fees at issue in this case are "other taxes" prohibited by the Twenty-Fourth Amendment.

ARGUMENT

I. The Mandate of the Twenty-Fourth Amendment Requires the Adoption of a Broad Definition of "Tax"

A. Congress Intended That the Twenty-Fourth Amendment Foreclose a Wide Variety of Efforts to Impair Voting Rights by Linking Them to Financial Obligations

The legislative history of the Twenty-Fourth Amendment demonstrates that it was intended to broadly apply to attempted impairment of voting rights via financial obligations. Congress discussed the abolition of the poll tax and other taxes denying or abridging a citizen's right to vote for almost fifteen years before passing and ratifying the Twenty-Fourth Amendment. 108 CONG. REC. 4366 (daily ed. Mar. 16, 1962) (statement of Sen. Holland) ("This is the 14th year I have offered the proposal in the Senate."). At the helm of the charge, introducing the bill each time, was its fervent sponsor, Senator Spessard Holland of Florida. By the time the proposition was put forth in the form in which it was passed, 77 senators voted in support of establishing the removal of financial barriers to the polls as a constitutional right. 108 CONG. REC. 5105 (daily ed. Mar. 27, 1962). Supporters of the Amendment understood and read the Amendment broadly.

Supporters, such as Representative Dante Fascell of Florida, decried paying for the right to vote, stating in floor debates that: "[T]he payment of money, whether directly or indirectly, whether in a small amount or in a large amount, should never be permitted to reign as a criterion of democracy. There should not

be allowed a scintilla of this in our free society." 108 CONG. REC. 17657 (daily ed. Aug. 27, 1962) (statement of Rep. Fascell).

Representative Baldwin of California very eloquently and succinctly made the point in his statement of support: "No person should have to pay for the privilege of voting." 108 CONG. REC. 17660 (daily ed. Aug. 27, 1962) (statement of Rep. Baldwin). Similarly, Senator Yarborough of Texas, whose constituents resided in one of the five states that still carried an explicit poll tax in 1962, lamented the disenfranchisement of the poor and unemployed and regarded the unabridged right to vote as among the highest of democratic ideals. *See* 108 CONG. REC. 4910 (daily ed. Mar. 23, 1962) (statement of Sen. Yarborough). Others, including Representative Halpern of New York, extolled the broad reach of the Amendment, recognizing that it would "prevent the imposition not only of a poll tax but of any other tax as a prerequisite to voting and will apply not only to a State but to the United States as well, and it is broad enough to prevent the defeat of its objectives by some ruse or manipulation of terms." 108 CONG. REC. 17669 (daily ed. Aug. 27, 1962) (statement of Rep. Halpern). Importantly, President Johnson remarked upon the amendment's passage that it stood for the proposition that "there can be no one too poor to vote." Friedman, Brendan F., *The Forgotten Amendment and Voter Identification: How the New Wave of Voter Identification Laws Violates the Twenty-Fourth Amendment*, 42 Hofstra L. R. 343 343 (2013).

The discussion of the proposed Amendment was not limited to financial obligations specifically denominated as taxes. Senator Eugene McCarthy of Minnesota broadly described a poll tax as an "unwarranted obstacle to participation in full citizenship." 108 CONG. REC. 4644 (daily ed. Mar. 21, 1962) (statement of Sen. McCarthy). Other supporters, such as Senator Yarborough of Texas, firmly believed that voting was not just a constitutional or governmental grant, but rather one of the "great democratic rights of Western man." 108 CONG. REC. 4910 (daily ed. Mar. 23, 1962) (statement of Sen. Yarborough) ("The time has come to drop the word 'privilege,' meaning some governmental granted boon, and to substitute the word 'right,' insofar as the franchise is concerned. Let us treat the 'right to vote' in governmental matters as one of the great democratic rights of Western man, along with freedom of speech, freedom of conscience, freedom of religion, freedom of the press, and along with the right to freedom from unreasonable search and seizure and the right to trial by jury.").

Senator Yarborough believed so deeply in the citizen's right to vote that he argued that the right should be as unabridged as those most basic rights guaranteed to us. *See id.* He rebuked justifications that poll taxes only affected a few, arguing that "if only one American citizen is deprived of his vote, then the poll tax should be abolished on the strength of that single injustice." 108 CONG. REC. 4911 (daily ed. Mar. 23, 1962) (statement of Sen. Yarborough). He decried the idea of putting

a monetary requirement between a citizen and the polls, regardless of intent or amount, and worried particularly about the ability of the indigent and the unemployed to exercise this fundamental right if any monetary requirement was imposed. Senator Yarborough best captured his sentiments in this statement during the floor debates: "The way to the American ballot box should be a freeway, not a toll road." *Id*.

Supporters of the Amendment were adamant that no fees should inhibit a citizen's right to vote. For example, during the Hearings before the House Committee on the Judiciary, Representative Boland indicated that "[t]here should not be any price tag or any other kind of tax on the right to vote." 108 CONG. REC. 17666 (daily ed. Aug. 27, 1962) (statement of Rep. Boland) (emphasis added). Like Senator Yarborough, Representative Yates of Illinois argued, "[p]lacing the payment of a fee between the voter and ballot box is distinctly not in keeping with the ideals of our democracy." 108 CONG. REC. 17666 (daily ed. Aug. 27, 1962) (statement of Rep. Yates) (emphasis added). Representative Gallagher of New Jersey similarly declared, "[a]ny *charge* for voting unjustly discriminates against people of limited means. And whatever the amount of money, a citizen of the United States should not have to pay for his constitutional right to vote." 108 CONG. REC. 17667 (daily ed. Aug. 27, 1962) (statement of Rep. Gallagher).

Congress's meaning was clear: a tax, by that name or any other, could not be linked to the right to vote.

B. Contemporaneous Supreme Court Jurisprudence Supports a Broad Application of the Twenty-Fourth Amendment.

Shortly after its ratification, the Supreme Court confirmed that the Twenty-Fourth Amendment should be applied broadly to protect the fundamental right at stake. In *Harman v. Forssenius*, the Court found a Virginia law unconstitutional because it required voters in federal elections either to pay the customary poll tax or to file a certificate of residence six months before the election. 380 U.S. 528 (1965).

The *Harman* Court recognized that defining "tax" too narrowly could allow states to continue to impermissibly restrict the franchise. It made clear that the Twenty-Fourth Amendment should be construed broadly to eliminate gamesmanship or workarounds—"nullif[ying] sophisticated as well as simple-minded modes of impairing" the right to vote. *Harman*, 380 U.S. at 540–41.

The Virginia law at issue in *Harman* offered a substitute procedure to the payment of a poll tax. The Supreme Court nevertheless invalidated the law, reasoning that the Twenty-Fourth Amendment "abolished [the poll tax] absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed." *Id.* at 542.

The Supreme Court's decision in *Harman* should guide the interpretation of "other tax" here. The *Harman* decision has been interpreted as finding that, "[t]he drafters and supporters of the Twenty–Fourth Amendment plainly intended that the Amendment reach those payments of money that placed a price on the franchise, regardless of whether those taxes could also be characterized as debts or fees." *Johnson v. Bredesen*, 624 F. 3d 742, 775 (2010) (Moore, J., Dissenting) (citing to *Harman*, 380 U.S. at 542).

Defining "tax" narrowly and therefore allowing other fees to prevent individuals from voting would conflict with this overarching intent. In fact, in 1966, in the context of striking down the poll tax as unconstitutional in state elections under the Fourteenth Amendment, the Supreme Court used the term "tax" interchangeably with "fee" in discussing the primary evil of the poll tax. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) ("The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a *fee* to vote or who fail to pay." (emphasis added)).

Harman and *Harper* evidence the broad common understanding of what amounted to an impermissible financial barrier to voting only a few short years after the Amendment's ratification and, by extension, the meaning that "other tax" had in the national consciousness at the time. They also emphasize that the

primary objection to the poll tax was the imposition of "*any* pecuniary obstacle on an individual's right to vote." *See Johnson*, 624 F.3d at 775 (Moore, J., dissenting) (emphasis added).[2]

C. The Twenty-Fourth Amendment Was Informed by the History of Poll Taxes in the United States, Which Includes a Broad Category of Financial Obligations Tied to the Right to Vote

The history of poll taxes demonstrates that the critical feature of the Twenty-Fourth Amendment is the prohibition on linking the right to vote to payment of a broad category of financial obligations to the government. In the early twentieth century, most states had some form of a poll tax. Poll taxes typically did not apply to all individuals, but rather were applied to specific categories of individuals—for example, those of a certain age or gender. Harvey Walker, *The Poll Tax in the United States*, Bulletin of the National Tax Association Vol. 9, No. 3, pp. 66-77 (Dec. 1923); see also *Breedlove v. Suttles*, 302 U.S. 302 U.S. 277, 281-82

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[2] The majority in *Johnson* concluded that Tennessee's voter restoration law, which precluded those convicted of a felony from voting until they paid child support arrears and/or restitution, was constitutional. Although she was not in the majority, Judge Moore's dissent, which thoughtfully explored the Twenty-Fourth Amendment implications of the ruling, is informative. Furthermore, *Johnson* is distinguishable from the current case because it concerned voter disqualification on the basis of failure to pay restitution and child support, "legal financial obligations the Plaintiffs themselves incurred," 624 F.3d at 751, not fees and court costs of the kind at issue here. *Johnson* did not address financial obligations akin to those that the District Court concluded in this case qualify as a "tax," and thus the majority opinion has no direct relevance to this case. See also n.4 *infra*.

(1937), *overruled by Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). Poll taxes were generally for small amounts, but they were significant to lower income citizens. *See Harman*, 380 U.S. at 539 (observing that in poll tax states, even where the taxes were nominal in amount, participation in voting was "relatively low as compared to the overall population which would be eligible") (quoting H.R. Rep. No. 1821, 87th Cong., 2d Sess., 3). These taxes, like other forms of taxation and fees, were levied for the express purpose of raising funds for the government. *See Breedlove*, 302 U.S. at 281 ("Levy by the poll has long been a familiar form of taxation, much used in some countries and to a considerable extent here, at first in the colonies and later in the states. . . . Poll taxes are laid upon persons without regard to their occupations or property to raise money for the support of government or some more specific end." (citation omitted)).

The history of poll taxes shows that the Twenty-Fourth Amendment was not focused on a particular form of financial obligation or obligations specifically related to voting. *See* Louis B. Boudin, *State Poll Taxes and the Federal Constitution*, 28 Va. L. Rev. 1 (1941) ("Contrary to current impression among the laity, the poll tax is not a tax on voting. It is nothing more than a head-tax; which, formally, at least, is laid on everybody, or at least every adult, with certain exceptions which are presumed to have nothing to do with voting but rather with capacity to pay."); *see also* Allison R. Hayward, *What Is an Unconstitutional*

"Other Tax" on Voting? Construing the Twenty–Fourth Amendment, 8 Elect. L.J. 103 (2009) ("The misimpression that a poll tax must be a tax on voting no doubt derives in part from the fact that we refer to voting places as polling places. But 'poll' originally was a term referring to the human head. At the polls we count heads and a poll tax is a head tax."). Historically, in states where the poll tax was explicitly linked to voting rights, revenue was often dedicated to raising funds for government endeavors such as schools and collected at a time wholly separate from the election. *See* Walker, *The Poll Tax in the United States*, Bulletin of the National Tax Association (Dec. 1923); *Harper*, 383 U.S. at 665 n.1 (explaining that under Virginia state constitution, $1.50 poll tax had to be paid at least "six months prior to the election in which the voter seeks to vote" and $1.00 of the tax was "to be used by state officials exclusively in aid of the public free schools" (quotation omitted)). As the Twenty-Fourth Amendment was intended to forbid that link, it is clear that the Twenty-Fourth Amendment outlawed the practice of conditioning the right to vote on payment of poll taxes or any other taxes, regardless of the specific form they took or purposes for which they were enacted. That is the exact practice at issue here.

D. *Richardson v. Ramirez* Does Not—and Cannot—Control the Twenty-Fourth Amendment Analysis

The Supreme Court has held that states may restrict voting in certain circumstances, including when a person has been convicted of a felony.

Richardson v. Ramirez, 418 U.S. 24 (1974). But *Richardson* does not control for purposes of the analysis of whether the requirement that an individual make a monetary payment to the government in exchange for the right to vote is a tax within the ambit of the Twenty-Fourth Amendment.

First, *Richardson* was decided under the Fourteenth Amendment, not the Twenty-Fourth. "The Twenty–Fourth Amendment is not subject to the same analysis as a statute under the Equal Protection Clause of the Fourteenth Amendment, with its various forms of scrutiny, or the balancing tests set forth in the Supreme Court's voting-rights cases." *Johnson*, 624 F.3d at 766 (Moore, J., dissenting).

More critically, however, while states may legally restrict the voting rights of those convicted of a felony under current law, it would repeat the ill of the poll tax to create a system whereby re-enfranchisement comes at a price that only some individuals can pay. As Judge Moore observed in her dissent in *Johnson*:

> "[O]ne of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise and [] the primary motivation of the Amendment was a general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax. The fact that [the statutes] set the price for the privilege of voting at something besides a government-imposed per capita levy is not determinative. The statute sets a price nonetheless, and this is the exact evil that the Twenty-Fourth Amendment was meant to address."

624 F.3d at 772 (Moore, J., dissenting) (internal citations omitted).

By contrast, under Defendants-Appellants' view that the Twenty-Fourth Amendment does not apply to citizens seeking re-enfranchisement, any tax could be exempted from the Twenty-Fourth Amendment if it were imposed subsequent to a criminal conviction. For example, Florida could impose an income tax of 10% on individuals convicted of crimes, wholly adopting the definition of "income" and all other terms from the U.S. Tax Code. By Defendants' logic, failure to pay this tax could be a basis for prohibiting an individual from voting. Yet there is no reasonable argument that any dictionary, drafter of the Twenty-Fourth Amendment, or ordinary citizen at the time of its enactment could have agreed that such payments were anything but "taxes." *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 569 (2012) (stating that hypothetical statute imposing costs based on income and collected along with an income tax return was a "tax" regardless of label). The mere fact of antecedent criminal conviction does not change a "tax" to something else.[3]

[3] Similarly, this Court should not follow the majority in *Johnson*, which held that restoration of voting rights is not subject to Twenty-Fourth Amendment analysis. 624 F.3d at 750–751. The majority does not attempt to reconcile this position with the Supreme Court's view that the Twenty-Fourth Amendment equally condemns "sophisticated as well as simple-minded modes of impairing" the voting right. *Harman*, 380 U.S. at 540–41. By the *Johnson* majority's logic, a state could pretextually disqualify broad swathes of the electorate from voting (on some basis that met rational-basis scrutiny), allow only those who could pay a poll tax to remove this disqualification, and the Twenty-Fourth Amendment would not be offended. Our Constitution has been amended fewer than twenty times since 1800.

The Twenty-Fourth Amendment expressly and unconditionally repudiated the practice of conditioning the right to vote on wealth or privilege, no matter how small the payment or what form it took. Requiring payment for access to the franchise, as Florida does here, runs afoul of that broad prohibition.

II. The Twenty-Fourth Amendment Should Be Applied Using a Straightforward Definition of "Tax" that Focuses on Whether the Right to Vote Has Been Linked to a Government's Efforts to Raise Revenue

The test for whether a financial obligation is a tax for purposes of the Twenty-Fourth Amendment should be consistent, functional, and straightforward. The term "tax" is susceptible to varying interpretations and applications across different areas of law. For example, in *National Federation of Independent Businesses v. Sebelius*, the Supreme Court found that the "penalty" for certain individuals who did not purchase health insurance was *not* a tax in its statutory analysis of the Anti-Injunction Act, but then found that the same penalty was a tax in its analysis of Congress' Article I powers to enact the penalty. *See NFIB*, 567 U.S. at 564. The history of the Twenty-Fourth Amendment and the Supreme Court's decision in *Harman* make clear that the right to vote should not hinge on such technicalities or labels. Instead, the inquiry should focus on whether the

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Amendments cannot be swept aside by such technicalities as the *Johnson* majority offers.

financial obligation performs the function of a tax: raising revenue through a government-imposed financial obligation.

The Twenty-Fourth Amendment must be implemented through a single federal definition of tax to ensure nationwide protection of the right to vote. Well before the Twenty-Fourth Amendment was drafted, the Supreme Court had recognized that a state's view of a financial obligation imposed by its law is not determinative of whether that obligation is a "tax" within the scope of the federal law at issue. *See State of New Jersey v. Anderson*, 203 U.S. 483, 491 (1906) ("[A] state court, while entitled to great consideration, cannot conclusively decide that to be a tax within the meaning of a Federal law providing for the payment of taxes, which is not so in fact."); *see also Macallen Co. v. Commonwealth of Massachusetts*, 279 U.S. 620, 625 (1929) ("As it many times has been decided neither state courts nor Legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect."). Prohibition of disenfranchisement through the imposition of intricate and obscure taxation procedures will only be effective if the application of the Twenty-Fourth Amendment does not itself vary according to different jurisdictions' laws. Therefore, it is critical that the status of a financial obligation as a "tax" under the Twenty-Fourth Amendment be evaluated through a single test informed by the goals and history of the Twenty-Fourth Amendment.

The Court should look to the function of a financial obligation imposed by a government to determine whether it is a tax, even if the obligation is not denominated as a tax. The "functional" approach to characterizing financial obligations as taxes was well-established at the time that the Twenty-Fourth Amendment was ratified. *See City of New York v. Feiring*, 313 U.S. 283, 285 (1941) ("We turn to its provisions and to the decisions of the state courts in interpreting them, not to learn whether they have denominated the obligation a 'tax' but to ascertain whether its incidents are such as to constitute a tax within the meaning of s 64."); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) ("In passing on the constitutionality of a tax law we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." (quotation omitted)); *United States v. Constantine*, 296 U.S. 287, 294 (1935) ("In the acts which have carried the provision, the item is variously denominated an occupation tax, an excise tax, and a special tax. If in reality a penalty it cannot be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and operation, regardless of name." (footnote omitted)); *United States v. La Franca*, 282 U.S. 568, 572 (1931) ("A 'tax' is an enforced contribution to provide for the support of government[.]").

The functional approach continues to be the starting point for analysis of whether a financial obligation is a "tax." *See, e.g.*, *NFIB*, 567 U.S. at 565

(explaining that Supreme Court precedent "confirm[s] this functional approach"); *United States v. Sotelo*, 436 U.S. 268, 275 (1978) ("That the funds due are referred to as a 'penalty' when the Government later seeks to recover them does not alter their essential character as taxes for purposes of the Bankruptcy Act . . . ."). The flexibility of the functional test also embodies the Supreme Court's guidance in *Harman* that the Twenty-Fourth Amendment forbids any law, whether straightforward or complex, that recreates the link between a financial obligation to government and the right to vote.

For the Twenty-Fourth Amendment, this functional approach involves an examination of whether raising revenue is one of the purposes of the financial obligation at issue. This attribute of taxation has long guided judicial analysis of tax laws. The Supreme Court has described taxes as "imposts levied for the support of the government, or for some special purpose authorized by it," *Meriwether v. Garrett*, 102 U.S. 472, 513–14 (1880), or "pecuniary burden[s] laid upon individuals or property for the purpose of supporting the government." *Anderson*, 203 U.S. at 492 (1906); *see also Feiring*, 313 U.S. at 287 ("A pecuniary burden so laid upon the bankrupt seller for the support of government, and without his consent thus has all the characteristics of a tax entitled to priority of payment in bankruptcy . . . ."); *Constantine*, 296 U.S. at 293 (law would be considered a tax "[i]f it was laid to raise revenue"); *Sonzinsky v. United States*, 300 U.S. 506, 514

(1937) ("Here the annual tax of $200 is productive of some revenue. . . . As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power.").[4]

A financial obligation imposed by a government does not lose its status as a tax if it has purposes in addition to raising revenue. The Supreme Court has consistently recognized that a tax can have a regulatory or deterrent purpose—even where the revenue obtained is "negligible" or the "revenue purpose of the tax [is] secondary." *United States v. Sanchez*, 340 U.S. 42, 44 (1950); *see also Sonzinsky*, 300 U.S. at 513 ("Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed."). The Supreme Court has even recognized that a legislature can impose a tax on illegal activity. *See United States v. One Ford Coupe Auto.*, 272 U.S. 321,

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[4] In *Johnson*, Judge Moore reviewed dictionary definitions of tax contemporaneous to the drafting of the Twenty-Fourth Amendment. These definitions all similarly include the attribute of raising money for the public fund. *See* 624 F.3d 742, 769 (Moore, J., dissenting) ("a usu[ally] pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes: a forced contribution of wealth to meet the public needs of a government." (quoting Webster's Third New International Dictionary 2345 (14th ed. 1961 & 15th ed. 1966)); "[a] forced burden, charge, exaction, imposition, or contribution assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state upon the persons or property within its jurisdiction to provide public revenue for the support of the government, the administration of the law, or the payment of public expenses." (quoting Ballentine's Law Dictionary 1255 (3d ed. 1969)); "[A] pecuniary contribution . . . for the support of a government." (Black's Law Dictionary 28 (4th ed. 1951)).

328 (1926) ("A tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose . . . is to make law breaking less profitable.").

Finally, the Court should keep the functional approach to the Twenty-Fourth Amendment straightforward. Some specialized areas of federal law have developed tests for distinguishing between various kinds of financial obligations to the government. For example, much of the Supreme Court's case law on the distinction between "taxes" and "penalties" arose due to constitutional questions about the limits of Congress' Article I powers. Here, the State relies on the Supreme Court's reference to "regulation and punishment" as characteristics of a "penalty" in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922). However, the Supreme Court in *Bailey* also noted that "[t]he difference between a tax and a penalty is sometimes difficult to define" and observed, "[w]here the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial[.]" *Id.* In *NFIB*, the Supreme Court distinguished the penalty that it found to be a "tax" in the Affordable Care Act, from the tax that it found to be a "penalty" in *Bailey* because it was not substantial, it did not involve scienter, and payment was to be made to the Internal Revenue Service. *See NFIB*, 567 U.S. at 522. As shown in Section III below, the District Court properly found that the fees in question here shared those

same characteristics. Moreover, as noted above, a tax can also have a regulatory purpose or otherwise be designed to shape behavior, like the "penalty" that was upheld as a "tax" in the ACA—but it would nonetheless be unconstitutional to condition the right to vote upon payment of that "penalty."

While the Supreme Court's tax jurisprudence offers guidance regarding the basic concept of a "tax," this Court should be wary of importing distinctions drawn for reasons entirely inapposite to the protection of voting rights under the Twenty-Fourth Amendment. For example, linking voting to a nominal regulatory fee should be no less unconstitutional than linking voting to a nominal tax. The Twenty-Fourth Amendment is concerned about the effect of a financial obligation on a civil right. As *Harman* indicates, this purpose requires a broad definition of "tax," not a narrow one.[5]

Applying the straightforward definition above—whether raising revenue is one of the purposes of the government-imposed financial obligation—captures the breadth of the Twenty-Fourth Amendment's reference to "any other tax." A test focused on the revenue-raising aspects of a law encompasses the poll taxes that inspired the Twenty-Fourth Amendment without constraining this important

[5] The distinction drawn in *Bailey* was intended to prevent impingements on individual rights through overbroad use of the federal taxation; in contrast, hewing to the Article I analysis here – instead of the proper Twenty-Fourth Amendment analysis – would result in *permitting* greater restrictions on the individual right to vote.

constitutional right to the particularities of those historical practices of disenfranchisement. *See Breedlove*, 302 U.S. at 281 ("Poll taxes are laid upon persons without regard to their occupations or property to raise money for the support of government or some more specific end."). Here, for example, the District Court was easily able to distinguish between certain fees that it determined to have the purpose of raising revenue, and other financial obligations, such as restitution, which it determined were related to criminal punishment. This easily administrable test will give full effect to the Twenty-Fourth Amendment and the protections it established for the right to vote.

III. The District Court Correctly Determined That Numerous Fees Imposed by Florida on Criminal Defendants Who Are Not Exonerated Are "Taxes" That Cannot Be Linked to the Right to Vote.

A government cannot cloak revenue-raising measures in the vocabulary of criminal justice to evade the Twenty-Fourth Amendment. The State contends that it does not violate the Twenty-Fourth Amendment by linking unexonerated criminal defendants' right to vote to payment of fees. In support of its argument that the fees are a component of criminal punishment, the State cites the Supreme Court's description of penalties in *United States v. La Franca*: "a 'penalty,' as the word is here used, is an exaction imposed by statute as punishment for an unlawful act." 282 U.S. 568, 572 (1931) (cited in Merits Br. at 46). However, the State omits the other half of this statement in *La Franca*: "A 'tax' is an enforced

contribution to provide for the support of government." 282 U.S. 568, 572 (1931). In fact, the fees imposed in Florida are expressly linked to the goal of raising revenue, both on the face of many statutes and in the state constitution. The functional analysis required by the Twenty-Fourth Amendment shows that Florida has created a set of taxes that are imposed on a particular group—those convicted or not exonerated of a crime.

The overlap of a taxed group with a group subject to criminal punishment does not change the fundamental revenue-raising purpose of the financial obligations. A tax remains a tax even if it is only imposed on a subset of people. *See, e.g.*, *Sonzinsky*, 300 U.S. at 512 ("In the exercise of its constitutional power to lay taxes, Congress may select the subjects of taxation, choosing some and omitting others."). As explained above, there is no reason a tax ceases to be a tax simply because it relates to criminal activity. *See supra* at Section II. The court costs assessed against individuals who are not acquitted in a Florida criminal proceeding illustrate how court costs and fees imposed on criminal defendants function as taxes for the purposes of the Twenty-Fourth Amendment.[6] Chapter 938 of the Florida statutes contains numerous miscellaneous fees that sentencing

[6] *Amici* do not contend that these costs and fees are the only costs or fees under Florida state law that violate the Twenty-Fourth Amendment when linked to the right to vote as in SB-7066.

courts are required to impose in all or certain types of criminal cases, including in cases in which adjudication is withheld and defendant enters a plea instead.

It is clear that these fees exist to generate revenue for the State.[7] In fact, the Florida state constitution states that court costs and fees are intended to raise revenue for the administration of the state court system. It directs that "adequate and appropriate filing fees for judicial proceedings and service charges and costs for performing court-related functions" shall provide "[a]ll funding for the offices of the clerks of the circuit and county courts" and may also provide funding for "[s]elected salaries, costs, and expenses of the state courts system." Fla. Const. art. V, § 14. Many provisions in Chapter 938 specifically direct that the funds collected pursuant to them will be remitted to the Florida Department of Revenue. *See* Fla. Stat. Ann. §§ 938.01(1)(a), 938.03(4), 938.04, 938.05(1)(a), 938.055, 938.06(2), 938.23. Many of the court costs imposed in Florida as part of a sentence do not vary with the seriousness of the crimes, the length of the sentence, or the level of culpability. Dist. Ct. Op. at 78.

The text of the statutes evinces clear intent—underscored by the Florida constitution—to raise revenue through fees on criminal defendants. *Compare*, *e.g.*,

[7] In fact, court costs are often referred to "taxable" costs. *See*, *e.g.*, *Distribution of Legal Expense Among Litigants*, 49 Yale L.J. 699 (1940).

Fla. Stat. Ann. § 938.08 ("The remainder of the surcharge . . . must be used only *to defray the costs* of incarcerating persons sentenced under s. 741.283 and provide additional training to law enforcement personnel in combating domestic violence" (emphasis added)), *with Feiring*, 313 U.S. at 285 (referring to taxes as "pecuniary burdens . . . for the purpose of *defraying the expenses* of government or of undertakings authorized by it." (emphasis added)). Section 938.04 imposes a 5% surcharge on all criminal fines, which is remitted to the Department of Revenue for deposit in the State's "Crimes Compensation Trust Fund." Similarly, Section 938.15 permits municipalities and counties to "assess an additional $2 for expenditures for criminal justice education degree programs and training courses, including basic recruit training, for their respective officers and employing agency support personnel." *See also* § 938.06 (charge of $20 for any person convicted of any criminal offense for deposit in the Crime Stoppers Trust Fund); § 938.13 ($14 of $15 fee "for allocation to local substance abuse programs").

Under the functional analysis required by the Twenty-Fourth Amendment, the fees levied under these provisions are taxes. Florida's description of these financial obligations as fees or court costs under state law does not alter the outcome of the functional analysis. *See supra* Section II (explaining that state law labels for financial obligations do not control analysis of whether those financial obligations are taxes for the purposes of federal law). This statutory scheme exists

to obtain money from a certain group of individuals (criminal defendants who are not acquitted) to fund government operations (the courts and criminal justice system).

Linking these financial obligations and the attendant procedural complexities of the criminal justice system to the right to vote is reminiscent of the small, yet onerous poll taxes that states charged to limit the right to vote before the Twenty-Fourth Amendment.[8] For example, supposedly "nominal" poll taxes created an opportunity for candidates or political parties to shape the electorate. They would offer to pay the poll taxes on behalf of individuals who could not afford it, exerting undue pressure on the individuals to vote in their favor. *See* Allison R. Hayward, *What is an Unconstitutional "other Tax" on Voting? Construing the Twenty-Fourth Amendment*, 8 Election L. J. 103, 107 (2009). Many of the "court costs" are relatively small charges that primarily impede lower income citizens and similarly create the opportunity for third parties to use

[8] This impact is reinforced by the fact that the State cannot even identify to the plaintiffs how much they must pay in order to re-obtain the right to vote and that it would take until at least 2026 to provide that information to all of the convicted citizens that the Florida referendum intended to re-enfranchise. *See* Dist. Ct. Op. at 1, 65-66.

financial power to influence voters. *See, e.g.*, Fla. Stat. Ann. §§ 938.01 ($3 court cost), 938.03 ($50), 938.06 ($20), 938.13 ($15), 938.15 ($2).[9]

To be clear, *Amici* do not contend that Florida cannot impose costs or fees in its criminal justice system and obtain revenue from them. The Twenty-Fourth Amendment simply forbids Florida from conditioning any person's ability to vote on the payment of such costs or fees, which were enacted to raise revenue.

[9] In response to Florida's legislation, some organizations have created funds to pay the fees on behalf of those seeking to re-register to vote, if such amounts can be identified. *See, e.g.*, News Service of Florida, *Lebron James to help Florida felons regain right to vote*, TAMPA BAY TIMES (July 27, 2020), https://www.tampabay.com/florida-politics/buzz/2020/07/27/lebron-james-to-help-florida-felons-regain-right-to-vote/. While this third party may mean well, the situation is ripe for recreating the circumstances that necessitated the ratification of the Twenty-Fourth Amendment.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to find that the financial obligations at issue in this case are "other taxes" prohibited by the Twenty-Fourth Amendment.

Dated: August 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,490 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: August 3, 2020

/s/ David W. Rivkin
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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 August 3, 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: August 3, 2020

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APPENDIX

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