No. 20-12003

In the United States Court of Appeals for the Eleventh Circuit

KELVIN LEON JONES, ET AL.,

Plaintiffs-Appellees,

v.

GOVERNOR OF FLORIDA, ET AL.,

Defendants-Appellants.

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

BRIEF OF FORMER OFFICIALS OF THE CIVIL RIGHTS DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, undersigned counsel certifies that (1) because all *amici* are individual persons, the Corporate Disclosure Statement is not applicable, and (2) the Certificate of Interested Persons filed by Plaintiffs-Appellees on August 3, 2020 is complete with the following exceptions:

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Dated: August 3, 2020

/s/ Olivia Kelman
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IDENTITY OF *AMICI CURIAE*

Amici are 36 former officials of the Civil Rights Division ("CRD") of the United States Department of Justice who had responsibility for enforcing federal laws protecting the right to vote, including the Voting Rights Act of 1965 ("VRA") as well as earlier laws. Some *amici* held the position of Assistant Attorney General in charge of the CRD, a position requiring nomination by the President and confirmation by the United States Senate. Other *amici* served in "career" positions in the CRD with responsibility for the enforcement of federal voting-rights laws. The average tenure in the CRD for the amici who held career positions was over 22 years, and 11 of those persons served for 30 years or more. The collective time period of *amici's* service extends from 1960 to 2018. A complete list of *amici*, their periods of service, and their positions is attached as Exhibit A.

INTERESTS OF *AMICI CURIAE*

Created pursuant to the Civil Rights Act of 1957, the primary activity of the CRD in its early years was enforcement of those voting-rights laws then in effect. The CRD's responsibility for enforcement of voting rights was greatly expanded by the VRA and extensions and amendments to the Act in 1970, 1975, 1982 and 2006. *Amici's* interest in this appeal arises from their experience enforcing federal voting-rights laws in the CRD.

Drawing on this unique background of experience, *amici* seek to assist the Court in evaluating the fundamental rights at stake. Particularly relevant is the experience of several *amici* who litigated early challenges to the continued use of poll taxes to disenfranchise African Americans and poor persons of all races. The Twenty-Fourth Amendment to the Constitution was ratified before the VRA's enactment and prohibited the use of any poll tax as a precondition to voting in federal elections. But certain states refused to abandon those taxes as preconditions to participation in their own state and local elections.

When framing the VRA in 1965, Congress expressed well-founded concern that payment of a tax as a precondition to voting should be prohibited in all elections and expressly found that a poll tax prevents the poor from voting, does not have any kind of relevance for checking for voting qualification, and often unfairly targets voters based on race or color. It included in section 10 of the VRA an unusual legislative provision that "authorized and directed" the Attorney General to file actions challenging the continued application of poll taxes.

After President Lyndon B. Johnson signed the VRA, the CRD immediately filed complaints challenging the poll tax laws in Alabama, Mississippi, Texas, and Virginia. Subsequently, in the landmark decision *Harper v. Virginia Board of Elections*, the Supreme Court found poll tax laws unconstitutional in state and local elections. 383 U.S. 663 (1966). *Amici* Stephen J. Pollak, Brian K. Landsberg, John

M. Rosenberg, and Alexander C. Ross prepared and tried these lawsuits as counsel for the United States.

Several *amici* have relevant experience prior to passage of the VRA litigating the legality of preconditions to registration and voting that informed many of the provisions of the VRA. This pre-VRA work of *amici* and other CRD officials demonstrated the shortcomings of case-by-case litigation to enjoin voting discrimination. Although the lawsuits were ultimately successful, they were almost always followed by new laws and procedures drawn to accomplish the same purpose as those just invalidated—unconstitutional restrictions on registration and voting. Section 5 of the VRA, the core provision of the Act, was designed to address this problem by precluding any change in voting laws and practices in jurisdictions with long histories of discrimination until it could be demonstrated that the change did not have the intent or, most importantly, the effect of unconstitutionally denying or abridging the right to vote. Enforcement of Section 5 has been a primary responsibility of *amici*.

Based on this long and deep experience enforcing federal voting-rights laws, *amici* are unanimous in their view that under the Constitution no state or local government may impose a financial fee as a prerequisite to voting. Accordingly, *amici* have a strong interest in opposing measures that operate effectively as poll

taxes and unconstitutionally impede the right to vote, like the pay-to-vote measure now at issue.

STATEMENT OF *AMICI CURIAE* UNDER RULE 29 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Counsel for all parties consent to the filing of this brief. No party's counsel authored the brief in whole or in part. No party or party's counsel, or any person other than *amici* and their counsel, contributed money intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUE

Whether a Florida law that conditions the voting rights of felons on monetary payments of fees authorized by Florida Statutes for the express purpose of generating revenue to fund specified governmental operations violates the Twenty-Fourth Amendment to the Constitution.

SUMMARY OF THE ARGUMENT

The Twenty-Fourth Amendment prohibits states from conditioning the right to vote in federal elections on the payment of a "poll tax or other tax." U.S. Const. amend. XXIV, § 1. Inclusion of the phrase "other tax" reflects a well-founded recognition that the objective of the Amendment could be nullified if states continued to charge a fee for voting but simply used another label. This is confirmed by repeated congressional efforts to end racial discrimination in voting.

Amici explain the background of their efforts to end racial discrimination in voting and the link between those efforts and the Twenty-Fourth Amendment, since it provides the proper context for considering the pay-to-vote requirement in this appeal. The right to vote is the most fundamental of rights that citizens possess, and federal courts now have an even more enhanced role than they did in earlier years in protecting against any unconstitutional infringement of that right.

The District Court gave this case the careful consideration mandated by the important right at stake, and properly concluded that Florida's requirement that felons pay fees and costs associated with their case to be eligible to vote is properly classified as a tax. That ends the inquiry, since it is beyond question that the Twenty-Fourth Amendment prohibits such a tax as a precondition to voting in a federal election—which is precisely what Florida has done.

Amici offer additional descriptions of the Florida law provisions that required the costs and fees at issue since the statutes themselves confirm that they are imposed to support the government. This "functional" approach for identifying a "tax" regardless of the label applied by the State, is consistent with, if not required by, the decision of the Supreme Court in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

The correctness of the decision of the District Court, as well as the link between the objectives of the Twenty-Fourth Amendment and laws designed to

prohibit discrimination in voting, is confirmed further by decisions of the Supreme Court and this Court in cases challenging state laws requiring certain types of identification cards to participate in elections. A basic starting point for legality is that the required form of identification be available for free. States have not attempted to argue that charging an identification-card fee, even if not labeled a "tax," is permissible.

Finally, Florida's argument that the "Twenty-Fourth Amendment does not apply" to felons has no merit. No decision from the Supreme Court or this Court supports that position. Accepting Florida's position would sanction legislation requiring felons to be current on property taxes or any other paywalls to voting—so long as they apply only to felons. That makes no legal sense. Florida must abide by all provisions of the Constitution even as it takes action to restore voting rights.

ARGUMENT

I. THE TWENTY-FOURTH AMENDMENT AND VOTING RIGHTS ACT OF 1965 WERE DESIGNED TO COMBAT SHIFTING DEVICES THAT LIMIT SUFFRAGE

The "problem of racial discrimination in voting" has a long and disturbing history, the hallmark of which is the "variety and persistence" of new state mechanisms impeding the right to vote. *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 311 (1966). Case-by-case litigation under the voting-rights provisions of

the 1957, 1960, and 1964 Civil Rights Acts[1] failed to cure the problem for a well-documented reason: "Even when favorable decisions have finally been obtained, ***some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests***." *Id.* at 314 (emphasis added).

Amici have first-hand experience on the front lines of the battle against shifting discriminatory devices, including the four years of litigation in Selma, Alabama that has been "repeatedly referred to as the pre-eminent example of the ineffectiveness of [then-]existing legislation." *Id.* at 314-15. As the Supreme Court observed, the "earnest efforts of the Justice Department and of many federal judges" were no match for the whack-a-mole "perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Id.* at 309, 313.

One of the methods states used to disenfranchise Black persons and poor persons was conditioning the right to vote on monetary payments of a poll tax.[2] To

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[1] *See* Civil Rights Act of 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637-38 (amending 42 U.S.C. § 1971 to provide means of further securing and protecting the right to vote); Civil Rights Act of 1960, Pub. L. No. 86-449, § 601, 74 Stat. 86, 88 (amending 42 U.S.C. § 1971 to strengthen judicial enforcement of the right to vote); Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 78 Stat. 241, 241-42 (amending 42 U.S.C. § 1971 to prohibit discrimination in voting, condemning literacy tests, and strengthen judicial enforcement of the right to vote).

[2] "Although frequently thought of as a tax on the privilege of voting, the poll tax is actually a head tax"—*i.e.*, a uniformly-imposed tax—and in "this context, 'poll' means 'head' rather than the term customarily used to describe a place of voting." *United States v. Texas*, 252 F. Supp. 234, 238 (W.D. Tex. 1966). *Amici* do not

combat such pay-to-vote devices, three-fourths of the states had by 1964 ratified the Twenty-Fourth Amendment to the Constitution, prohibiting conditioning the right to vote in a federal election on payment of "any poll tax or other tax":

> Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Lauding the ratification, President Johnson declared: "There can be no one too poor to vote." Larry J. Sabato & Howard R. Ernst, *Encyclopedia of American Political Parties and Elections* 461 (Facts on File, updated ed. 2007).

The term "other tax" in the Twenty-Fourth Amendment evidences its purpose to halt for federal elections the pattern of ever-changing discrimination recognized by the Supreme Court in *Katzenbach*. Seeking a powerful cure-all for both federal and state elections, Congress enacted the Voting Rights Act of 1965 to "banish the blight of racial discrimination in voting." *Katzenbach*, 383 U.S. at 308.

Indicating the level of its concern, Congress expressly included provisions aimed at ending the poll tax in the VRA, notwithstanding the Twenty-Fourth Amendment. Section 10(a) reports the following key congressional findings about the wealth and race discrimination inherent in pay-to-vote poll tax laws:

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suggest that states lack the authority to impose a poll tax in general, so long as the tax is not imposed as a prerequisite to voting.

> The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

Congress then in Section 10(b) "authorized and directed" the Attorney General to file actions to seek "relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, ***or substitute therefor*** enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purpose of this section." With the words "or substitute therefor" in Section 10(b), the congressional mandate specifically recalled state efforts to thwart constitutional mandates by adopting new financial preconditions to voting to continue the discrimination.

Amici's first-hand experience in litigating against poll taxes and marshalling evidence in those cases confirms the congressional findings in Section 10 of the VRA. Within four days of the signing of the VRA, the CRD sued Alabama, Mississippi, Texas, and Virginia to declare unconstitutional their poll tax requirements. *Amici* developed the facts and legal arguments in each case, and expended significant efforts to prepare factual records for trial. The Attorney General's 1966 Report to Congress explains that in each case:

> [D]epositions were taken of county tax officials and in some cases of Negroes who had attempted to pay the tax to establish the manner of administration of the tax. Numerous voting records and poll tax payment documents were photographed and inspected to provide statistical information for the court. In Alabama, for example, agents of the Federal Bureau of Investigation and Departmental attorneys photographed records and counted poll taxpayers in various years in each of the State's 67 counties.

United States Department of Justice, *Annual Report of the Attorney General of the United States* 195 (1966). Three-judge federal courts struck the taxes as unconstitutional in all four cases.

To illustrate, in *United States v. Texas*, *amici* "traced the historical development of the poll tax as a prerequisite to voting" to show discrimination based on race and wealth. 252 F. Supp. at 242. The three-judge court found that a "primary purpose" of "making payment of a poll tax a precondition to the right to vote was the desire to disenfranchise the Negro and the poor white[s]." *Id.* at 245. While not a "sufficient reason today for declaring it unconstitutional," the court held that "the right to vote is one of the fundamental personal rights included within the concept of liberty" and it "clearly constitutes one of the most basic elements of our freedom." *Id.* at 245, 250. Because "only those who wish to vote pay the poll tax, the tax as administered by the State is equivalent to a charge or penalty imposed on the exercise of a fundamental right." *Id.* at 254.

In *United States v. Alabama*, *amici* presented similar historical evidence regarding the poll tax's discriminatory origins dating back to "the Constitutional

Convention of 1901." 252 F. Supp. 95, 101 (M.D. Ala. 1966). Relying on this history, the three-judge court held that the poll tax abridges the right to vote because of race: "Alabama has consistently devoted its official resources to maintaining white supremacy and a segregated society. … In this environment the poll tax, uniquely a part of the original package of discriminatory political devices, cannot be administered consistently with the commands of the Fifteenth Amendment." *Id*. Judge Frank M. Johnson, concurring, emphasized the "fundamental" nature of the right to vote and would have struck the poll tax under the Fourteenth Amendment as well:

> [I]n my opinion, the fundamental issue in this case and one that should be decided prior to reaching the Fifteenth Amendment issue is whether any tax levied on voting and carrying the sanction of disfranchisement for nonpayment is constitutionally permissible under the due process clause of the Fourteenth Amendment. I am of the firm opinion that it is not. The poll tax is invalid in its very conception; the principle of a tax on the right to vote is constitutionally indefensible.

Id. at 105.

Before the Virginia or Mississippi poll tax cases were resolved, the Supreme Court decided *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), holding the Virginia poll tax unconstitutional. Then-Solicitor General Thurgood Marshall presented the views of the CRD as *amicus curiae*. *See id.* at 664. The Court held that "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." *Id.* at 666. In language mirroring the congressional purpose articulated in Section 10(a)(ii) of the VRA, the Court held that "wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 670. The three-judge courts presiding over CRD's poll tax cases against Mississippi and Virginia thereafter ruled in conformance with *Harper*. *See United States v. Mississippi*, 11 Race Rel. L. Rep. 837 (S.D. Miss. Mar. 31, 1966); *United States v. Virginia*, 11 Race Rel. L. Rep. 853 (E.D. Va. Apr. 1, 1966).

In sum, *amici's* experience preparing and trying these poll tax cases confirms Congress' findings in Section 10 of the VRA. That experience teaches that imposing taxes as a precondition to voting unconstitutionally discriminates by exacting a financial cost on suffrage, a cost that poor people can ill afford and that has a disproportionate racial impact.

The VRA's other broad remedial provision—Section 5's requirement that jurisdictions with a history of discrimination obtain the Attorney General's preclearance for any future voting prerequisites—allowed *amici* to ensure that pay-to-vote schemes did not resurface under different banners after eliminating the formal poll tax. These prophylactic measures remained until the Supreme Court decided *Shelby County v. Holder*, 570 U.S. 529 (2013).

In *Shelby County*, the Supreme Court recognized that "voting discrimination still exists; no one doubts that." *Id.* at 536. But national circumstances had changed markedly since 1965, and "these improvements are in large part ***because of*** the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process." *Id*. at 548 (original emphasis). The statistical formula for selecting jurisdictions subject to the preclearance provisions of Section 5 had not changed over the years, and the Supreme Court found it no longer met constitutional standards. At the same time, the Supreme Court took care to emphasize that the "decision in no way affects the permanent, nation-wide ban on racial discrimination in voting." *Id.* at 557.

The practical import of *Shelby County* is that the role performed by *amici* from 1965 until 2013—*i.e.*, scrutinizing under Section 5, as the surrogate of the U.S. District Court for the District of Columbia, any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" prior to implementation by covered states, including Florida[3]—has been transferred

[3] Prior to the *Shelby County* decision, five Florida counties (Collier, Hardee, Hendry, Hillsborough and Monroe) were subject to the Section 5 preclearance requirements. United States Department of Justice, *Jurisdictions Previously Covered By Section 5 at the Time of the Shelby County Decision*, https://www.justice.gov/crt/jurisdictions-previously-covered-section-5 (last updated Mar. 11, 2020). Because state-wide changes in voting procedures would be implemented in those counties, the Florida law at issue here would have been reviewed under Section 5. *See* 28 C.F.R. § 51.23 (2020).

to federal courts in the various states. *Amici* emphasize the importance of this new role of federal courts analyzing new state prerequisites to voting. Here, the Court must play that role in scrutinizing Florida's pay-to-vote law under the Twenty-Fourth Amendment, which forbids conditioning the right to vote on the payment of money that is, in substance, a tax.

II. FLORIDA'S PAY-TO-VOTE LAW VIOLATES THE TWENTY-FOURTH AMENDMENT

Congress and the Supreme Court have recognized that the Constitution bans sophisticated, shifting schemes making payment of a tax a precondition for voting. Though cloaked in new labels, Florida's pay-to-vote system is simply another poll tax substitute imposing a financial bar to voting that the Constitution bans and that courts rejected long ago. The District Court saw this voter paywall for what it is and correctly held that (1) court fees and costs constitute "taxes," and therefore (2) the Twenty-Fourth Amendment precludes Florida from conditioning voting in federal elections on payment of such amounts. *See* A1105-A1113.

The Twenty-Fourth Amendment provides that a citizen's right to vote "shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." No showing of any type of 'intent,' discriminatory or

otherwise, is required to establish a violation, only proof that a law conditions voting on payment of a tax.[4]

Thus, the "only real issue is whether the financial obligations now at issue are taxes." A1106. As this Court noted at the preliminary injunction stage of the case, whether Florida's "scheme operated as an unconstitutional poll tax" turns, at least in part, on "facts about the function of these fees in the criminal justice system." *Jones v. Governor of Florida*, 950 F.3d 795, 807 n.8 (11th Cir. 2020). The District Court conducted a detailed analysis of the evidence presented at trial regarding the function of these fees, and reasonably found that they are plainly "taxes."[5] *See* A1109-A1113. That finding ends the inquiry.[6] Florida does not dispute that the payment is a precondition to voting in the upcoming election for President and other federal

[4] The relief afforded by the District Court below may well be too narrow. The Twenty-Fourth Amendment prohibits conditioning the right to vote on ***any tax***, not only on taxes a person cannot afford to pay.

[5] The District Court's careful analysis comports with guidance issued by this Court less than two weeks ago in the context of claim challenging the constitutionality of an Alabama law requiring voters to present a free photo identification card. *See Greater Birmingham Ministries v. Alabama*, No. 18-10151, 2020 WL 4185801 (11th Cir. July 21, 2020). Writing for this Court, Judge Branch emphasized: "We approach this case with caution, bearing in mind that these circumstances involve one of the most fundamental rights of our citizens: the right to vote." *Id*. at *8 (internal citations omitted).

[6] Florida agrees that "[t]his Court reviews factual findings for clear error." Appellants' En Banc Opening Br. at 12.

offices, and ***any tax*** that is imposed as a precondition to voting in that election violates the Twenty-Fourth Amendment.

The District Court's determination that the fees are taxes follows from the Supreme Court's direction to lower courts to apply a "functional approach" when determining whether a financial exaction should "for constitutional purposes be considered a tax." *National Federation,* 567 U.S. at 565-67. This "functional approach" looks beyond the legislature's "choice of label" for these exactions, acknowledges that contrary labels do "not alter their essential character as taxes," and focuses on their "practical operation." *Id.* at 564-65. One "practical characteristic" that supports concluding that a "payment may for constitutional purposes be considered a tax" is that the exaction "contains no scienter requirement." *Id.* at 565-66. The most significant factor is whether the subject "process yields the essential feature of any tax: It produces at least some revenue for the Government." *Id.* at 564.

The financial exactions at issue here—court fees and costs—exhibit the "essential feature of any tax." *Id.* As the District Court found, they "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." A1111-A1112. The fees also contain no scienter requirement, and are assessed for any

felony regardless of whether the underlying criminal offense required proof of intent. These facts are plain on the face of the authorizing statutes and confirms that the fees are taxes. Each fee statute is expressly drawn by the Florida Legislature to generate revenue, to mandate a specific operational purpose for which the revenue must be used, and to require collection of the revenue for any felony regardless of intent. For example:

- **Section 938.05, Florida Statutes**. Any person pleading to or convicted of "***any felony*** … shall pay as a cost in the case" a sum of "$225." § 938.05(1), Fla. Stat. (emphasis added). The costs "shall be remitted monthly to the Department of Revenue for deposit into the Clerks of the Court Trust Fund" and must be reserved "***for use by the clerk of the circuit court in performing court-related functions***." § 142.01, Fla. Stat. (emphasis added). The sole purpose of this $225 cost applicable to any felony is raising revenue to pay for the State's court-related operations.

- **Section 939.185(1)(a), Florida Statutes**. Florida counties "may adopt by ordinance an additional court cost, not to exceed $65, to be imposed by the court when a person" pleads to or is convicted of "***any felony***." § 939.185(1)(a), Fla. Stat. (emphasis added). The funds "***shall***" be used for "***funding for the elements of the state court system***." *Id.* (emphasis added). Many Florida counties charge such fees. *See, e.g.*, Miami-Dade Cnty., Courts Code § 11-11 (2020). The sole purpose of this $65 fee applicable to any felony is raising revenue to pay for sustaining the operations of the state court system.

- **Section 938.055, Florida Statutes**. Florida courts "assess a defendant who pleads guilty or nolo contendere to, or is convicted of any provision of chapters 775-896," of the Florida Statutes setting out crimes, "an amount of $100." § 938.055, Fla. Stat. The $100 fee must "be ***used by the statewide criminal analysis laboratory system***." *Id.* (emphasis added). The sole purpose of this $100 fee is raising revenue to pay for the State's criminal laboratory system.

- **Section 938.04, Florida Statutes**. The legislature "established and created as a court cost an additional 5-percent surcharge thereon which shall be imposed" with a fine. § 938.04, Fla. Stat. The "additional court cost created under this

section shall be remitted to the Department of Revenue for deposit in the Crimes Compensation Trust Fund." *Id.* (emphasis added). The funds must be used "for ***the payment of all necessary and proper expenses incurred by the operation of the department***." § 960.21, Fla. Stat. (emphasis added). The sole purpose of this court cost is raising revenue to pay for the government's operational costs of collecting fines.

- **Section 775.083(2), Florida Statutes**. The "court costs imposed by this section shall be $50 for ***a felony***." § 775.083(2), Fla. Stat. (emphasis added). These funds "shall be deposited by the clerk of the court into an appropriate county account for disbursement for the purposes provided in this subsection." *Id.* In particular, the government "***must expend such funds for crime prevention programs***." *Id.* (emphasis added). The sole purpose of this $50 fee is raising revenue to pay for crime prevention programs.

The plain terms of the fee statutes written by the Florida Legislature establish that the amounts are "taxes."

Case law stemming from challenges to the constitutionality of voter identification requirements supports the conclusion that court fees function as "other taxes" banned by the Twenty-Fourth Amendment. In *Crawford v. Marion County Election Board*, the Supreme Court considered "the constitutionality of an Indiana statute requiring citizens voting in person … to present photo identification issued by the government." 553 U.S. 181, 185 (2008). Critically, Indiana's statute had no pay-to-vote component because "the State offers free photo identification cards." *Id.* at 186. The Court analyzed the "burdens" associated with the law and found them "neither so serious nor so frequent as to raise any question about the constitutionality." *Id.* at 197. But in reaching that holding, the Court cited *Harper v. Virginia Board of Elections* in reasoning that the outcome would be different if

Indiana required payment of a fee to obtain the identification card, rather than offering them for free:

> The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, ***would not save the statute under our reasoning in Harper, if the State required voters to pay a tax or a fee to obtain a new photo identification***. But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's BMV are also free.

Id. at 198 (applying *Harper*, 383 U.S. 663).

Just recently, this Court conducted a detailed analysis of *Crawford* in reviewing a constitutional challenge to an Alabama law setting a setting a voter identification card requirement. *See Greater Birmingham Ministries*, 2020 WL 4185801, at *12-13. Writing for the Court, Judge Branch correctly relied upon the parallel circumstances previously confronted by the Supreme Court: "Here, as in *Crawford*" the challenged law "provides ***free*** photo voter ID cards to any Alabamian who wants one." *Id.* at *13 (emphasis added). In upholding the Alabama law, this Court repeatedly emphasized the fact that the Supreme Court deemed critical—that the ID cards were made available to the public ***free of charge***. *Id.* at *6 ("Alabama has advertised the photo ID requirement and the availability of free voter IDs"); *10 ("free IDs are issued"); *17 (the law "offers free photo IDs to Alabama citizens who wish to obtain one"); *20 ("any Alabamian who wants one could obtain a free photo ID from the state"); *28 (Alabama makes it "free for voters who lack a valid ID but wish to obtain one"). The outcome would have been different if Alabama required

Alabamians to pay money for the ID card, as Florida requires Floridians to pay fees to vote here.

Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009) also provides support for holding that Florida's fee requirement must fail as a tax under the Twenty-Fourth Amendment. There, this Court considered a Georgia statute requiring voters "to present a government-issued photo identification" that "could be obtained for a fee of $20 to $35." *Id.* at 1346. The plaintiffs "alleged that the statute imposed a poll tax in violation of the Twenty–Fourth Amendment." *Id.* The district court issued a preliminary injunction, finding "a substantial likelihood of success on the merits of their claims that the statute unduly burdened the right to vote and constituted a poll tax." *Id.* During the pendency of the appeal, the state abandoned the $20-$35 fee and enacted a new statute that "requires each county to issue ***free of charge*** a 'Georgia voter identification card.'" *Id.* (emphasis added). The appeal continued on other issues, but the plaintiffs "sought attorney's fees and expenses for their challenge of the earlier statute that charged a fee for voter identification cards" under the Twenty-Fourth Amendment and the "district court determined that the NAACP and voters were prevailing parties as to their challenge of that statute as a poll tax, and it awarded attorney's fees." *Id.* at 1349. This Court affirmed the plaintiffs' prevailing-party status on the Twenty-Fourth Amendment claim at the preliminary injunction stage and the award of "attorney's fees for [the]

challenge of the earlier statute that charged a fee for a voter identification card." *Id.* at 1355. Implicit in this Court's holding is the recognition that conditioning voting on the payment of identification-card fees would amount to a tax prohibited by the Twenty-Fourth Amendment.

This Court should also reject Florida's argument that the "Twenty-Fourth Amendment does not apply" because only felons must pay the fees as a prerequisite to voting. Appellant's Br. at 44. That cannot be a defense. If it were, then it would mean that Florida could enact legislation requiring felons to certify payment of state property taxes as a prerequisite to voting, charging felons an admission tax to enter a voting booth, or any other imaginable paywalls to voting—so long as they apply only to felons. The Twenty-Fourth Amendment contains no exception allowing Florida to impose voting taxes on some felons.

Rather, at the preliminary injunction stage, this Court correctly interpreted Supreme Court precedent in finding it "clear that ***the abridgement of a felon's right to vote is still subject to constitutional limitations; states do not have carte blanche to deny access to the franchise to some felons and not others***." *Jones*, 950 F.3d at 822 (emphasis added). That conclusion flows from the only logical interpretation of the Supreme Court's decision in *Richardson v. Ramirez*, where the Court upheld a state's whole-cloth exclusion of convicted felons but remanded for further analysis of the "alternative contention that there was such a total lack of uniformity in county

election officials' enforcement of the challenged state laws as to work a separate denial of equal protection." 418 U.S. 24, 56 (1974). The same basic principle underlies *Johnson v. Governor of Florida*, where this Court upheld the Florida's law excluding all felons not granted clemency, but noted that "[u]nder Florida's Rules of Executive Clemency, however, the right to vote can still be granted to felons who cannot afford to pay restitution" and "Florida does not deny access to the restoration of the franchise based on ability to pay." 405 F.3d 1214, 1216–1217 n.1 (11th Cir. 2005) (en banc). The *Johnson* Court never held that laws conditioning a felon's right to vote on payment of taxes stand beyond constitutional review.

Having repealed the exclusion of all felons from the franchise, the Constitution prohibits Florida from now selectively withholding the franchise under a "system which excludes those … who fail to pay." *Harper*, 383 U.S. at 668. The system on appeal conditions voting on monetary payments to Florida and offends the Constitution.

CONCLUSION

The judgment of the District Court should be affirmed.

Dated: August 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the type-volume limitation of Rule 29(a)(5) of the Federal Rules of Appellate Procedure because the brief contains 6,051 words, excluding the parts of the brief excepted by 11th Cir. R. 29-3.

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

Dated: August 3, 2020

/s/ Olivia Kelman
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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020, I electronically filed the foregoing document with the Clerk of Court through the CM/ECF system. I further certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

Dated: August 3, 2020

/s/ Olivia Kelman
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EXHIBIT A

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Amici Organized Chronologically Based on the
Year that Service in the Civil Rights Division Began[1]

Gerald W. Jones 1960-1995 *Chief, Voting Section*	Howard A. Glickstein 1960-1965 *Attorney, Appeals and Research Section*
Thelton E. Henderson 1962-1963 *Trial Attorney*	John M. Rosenberg 1962-1970 *Deputy Chief, Southeastern Section*
Alexander C. Ross 1962-2001 *Trial Attorney* *Southwestern Section*	Brian K. Landsberg 1964-1993 *Chief, Appellate Section* *Acting Deputy Assistant Attorney General for Civil Rights*
Stephen J. Pollak 1965-1969 *First Assistant to Assistant Attorney General for Civil Rights* *Assistant Attorney General for Civil Rights*	James P. Turner 1965-1994 *Deputy Assistant Attorney General for Civil Rights* *Acting Assistant Attorney General for Civil Rights*
Barry H. Weinberg 1965-2000 *Deputy Chief, Voting Section*	David B. Marblestone 1966-1972, 1979-1985, 1987-1994 *Attorney, Voting Section* *Director, Office of Legislation and Special Projects*

[1] The first line under each name identifies the attorney's period of service in the Civil Rights Division. Remaining lines identify the position(s) involving voting-rights enforcement that the person held for all or some of her/his period of service.

Joseph D. Rich 1968-2005 *Chief, Voting Section*	Paul F. Hancock 1970-1997 *Director of Litigation, Voting Section* *Acting Deputy Assistant Attorney General for Civil Rights*
Robert R. Rush 1971-1973 *Trial Attorney, Voting Section*	Mark L. Gross 1973-2016 *Deputy Chief, Appellate Section*
Sheila K. Delaney 1974-2011 *Trial Attorney, Voting Section*	David H. Hunter 1975-2000 *Trial Attorney, Voting Section*
Jessica Dunsay Silver 1975-2013 *Principal Deputy Chief, Appellate Section*	Brian F. Heffernan 1978-2011 *Special Litigation Counsel, Voting Section*
Loretta King 1980-1990, 1992-2011 *Deputy Chief, Voting Section* *Deputy Assistant Attorney General for Civil Rights* *Acting Assistant Attorney General for Civil Rights*	Mark A. Posner 1980-2003 *Special Counsel, Voting Section*
Linda F. Thome 1980-2012 *Attorney, Appellate Section*	Ellen M. Weber 1980-1985 *Trial Attorney, Voting Section*
Sandra S. Coleman 1981-1992 *Director of Section 5* *Deputy Chief, Voting Section*	William Yeomans 1981-2005 *Attorney, Appellate Section* *Chief of Staff* *Acting Assistant Attorney General for Civil Rights*
Zita Johnson-Betts 1983-2016 *Deputy Chief, Voting Section*	Diana K. Flynn 1984-2018 *Chief, Appellate Section*

Robert A. Kengle 1984-2005 *Deputy Chief, Voting Section*	Lee H. Rubin 1989-1996 *Trial Attorney, Voting Section*
John R. Dunne 1990-1993 *Assistant Attorney General for Civil Rights*	Samuel R. Bagenstos 1994-1997, 2009-2011 *Attorney, Appellate Section* *Deputy Assistant Attorney General for Civil Rights*
Deval L. Patrick 1994-1997 *Assistant Attorney General for Civil Rights*	Isabelle Katz Pinzler 1994-1998 *Deputy Assistant Attorney General for Civil Rights* *Acting Assistant Attorney General for Civil Rights*
Gilda R. Daniels 1995-2006 *Deputy Chief, Voting Section*	Bill Lann Lee 1997-2001 *Assistant Attorney General for Civil Rights*
Sarah E. Harrington 2000-2017 *Attorney, Appellate Section* *Assistant to the Solicitor General*	Vanita Gupta 2014-2017 *Acting Assistant Attorney General for Civil Rights*