No. 20-12003

In the United States Court of Appeals for the Eleventh Circuit

KELVIN LEON JONES, ET AL.,

Plaintiffs–Appellees,

v.

RON DESANTIS, ET AL.,

Defendants–Appellants.

EN BANC REPLY BRIEF OF DEFENDANTS-APPELLANTS

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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308. State of Colorado, *Amicus Curiae*

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312. State of Hawaii, *Amicus Curiae*

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314. State of Kentucky, *Amicus Curiae*

315. State of Louisiana, *Amicus Curiae*

316. State of Maryland, *Amicus Curiae*

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318. State of Michigan, *Amicus Curiae*

319. State of Minnesota, *Amicus Curiae*

320. State of Mississippi, *Amicus Curiae*

321. State of Nebraska, *Amicus Curiae*

322. State of Nevada, *Amicus Curiae*

323. State of New Jersey, *Amicus Curiae*

324. State of New Mexico, *Amicus Curiae*

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327. State of Pennsylvania, *Amicus Curiae*

328. State of South Carolina, *Amicus Curiae*

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365. The Cato Institute, *Amicus Curiae*

366. The Fines and Fees Justice Center, *Amicus Curiae*

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

Dated: August 10, 2020

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INTRODUCTION

Judging by the number of pages of briefing filed by Plaintiffs and their many amici, one would conclude that this is a difficult case. It is not. In 2018, the voters of Florida broke with nearly 200 years of State history and adopted a conditional means for automatically reenfranchising most felons. No one disputes that the voters did not have to do it. They could have rejected Amendment 4 and continued the *permanent* disenfranchisement of all felons. Indeed, a substantial minority voted against it. And to qualify a felon for reentry into the body politic, the voters asked only that he "complete all terms of sentence." That is, once justice had been served in the felon's case—once he had paid his debt to society in full—the felon's political life-sentence would be commuted. To be sure, not all felons who would like to take advantage of this act of grace would be able to; some would not be able to outlive their carceral term, and others would not be able, at least immediately and perhaps ever, to pay off their financial terms of sentence. But the voters insisted, as a matter of simple justice, that the right to vote of a person who lost it *as a consequence of his conviction of a felony* should be restored only if he has paid the debt he owes to society *as a consequence of his conviction of a felony*. This was the voters' decision to make, and it matters not at all whether Plaintiffs, or even this Court, agree that their decision was fair and just and right. For their decision was clearly rational, and that is all the Constitution requires of it.

ARGUMENT

I. Amendment 4 and SB-7066 Satisfy Equal Protection.

A. Plaintiffs Do Not State a Wealth-Discrimination Claim.

For "a reenfranchisement scheme [to] violate equal protection" it must have "*both* the purpose and effect of invidious discrimination." *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018). Plaintiffs' attempts to evade the purpose prong lack merit.

Plaintiffs for the first time argue that SB-7066 is not "wealth-neutral," but rather draws "an invidious facial distinction," "because, in operative effect, it necessarily disenfranchises only [felons] unable to pay." Gruver Br. 32. Even putting aside that SB-7066 does not disenfranchise *anyone*, this assertion is wrong. Amendment 4 and SB-7066 condition restoration of voting eligibility on completion of *all* terms of sentence, financial, carceral, and supervisory. Whether any felon completes *all* terms of sentence does not depend solely on ability to pay his *financial* terms of sentence. A wealthy felon in prison or on probation will not be able to vote regardless of financial means. Neither will a felon who can afford to pay but does not, nor a felon who is well off but not well off enough to pay a large restitutionary judgment.

That requiring felons to complete their financial terms of sentence has a disparate effect on those unable to pay does not render SB-7066 facially

discriminatory. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), recognized a veterans-preference statute as facially sex-neutral, even though 98% of Massachusetts veterans were male. *Id.* at 270. If a law with such radically disparate effects is neutral on its face, so is SB-7066.

True, *Williams v. Illinois*, 399 U.S. 235 (1970), held that "a law nondiscriminatory on its face," but "grossly discriminatory in its operation" discriminated based on wealth in violation of the Equal Protection Clause. *Id.* at 242 (quoting *Griffin v. Illinois*, 351 U.S. 12, 17 n.11 (1956) (plurality)). But *Williams* and *Griffin* came before *Washington v. Davis*, 426 U.S. 229 (1976). Since *Davis*, the Court has consistently held that disproportionate effect alone is not enough to sustain an equal-protection claim, including a wealth-discrimination claim. In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the only post-*Davis* case addressing this issue, the Court explained that laws that are "merely *disproportionate* in impact" are subject to *Davis*'s discriminatory-purpose requirement. *Id*. Only laws (like those in *Griffin* and *Williams*) that disadvantage "all indigents and do not reach anyone outside that class" fall beyond *Davis*, *id.*; otherwise *every* law that disparately impacts the indigent would implicate the Equal Protection Clause. Indeed, the Court explained that another case "d[id] not guide [the Court's] inquiry" because "the classification there at issue disadvantaged nonindigent as well as indigent appellants." *Id.* at 114 (citing *Lindsey v. Normet*, 405 U.S. 56, 79 (1972)).

Plaintiffs argue that the Court uses "indigency" and "inability to pay" interchangeably. But if *M.L.B.* meant that facially wealth-neutral laws that disadvantage all those "unable to pay"—regardless of their level of absolute wealth—are subject to equal-protection challenges, then *all* wealth-discrimination suits could proceed on a disparate-impact theory. The Court expressly disclaimed such a rule that would call into question "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor . . . than to the more affluent . . . ." *M.L.B.*, 519 U.S. at 126 (quoting *Davis*, 426 U.S. at 248).

Plaintiffs' cases suggesting that the Court considers "inability to pay" divorced from an "indigency" classification are distinguishable. For example, in *Bearden v. Georgia*, 461 U.S. 660 (1983), the Court explained that "indigency in th[e] context" of that case was "a relative term rather than a classification." *Id.* at 666 n.8. That context, however, was one in which the Court eschewed the doctrinal framework of equal protection for due process because the "more appropriate question [there wa]s whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process," not whether a statutory classification discriminated against the poor. *Id.*

Likewise, the ballot-access cases offer Plaintiffs no support. The filing-fee scheme in *Bullock v. Carter*, 405 U.S. 134 (1972), had "a real and appreciable impact

on the exercise of the franchise," "as in *Harper* [*v. Virginia State Board of Elections*, 383 U.S. 663 (1966)]," *see* 405 U.S. at 144, and wealth is not relevant to a claim under *Harper*, *see* 383 U.S. at 668. And the Court in *Lubin v. Panish*, 415 U.S. 709 (1974), *did* "evaluate the plaintiff's level of poverty," *contra* Gruver Br. 34, emphasizing that the plaintiff stated that he had "no resources and earned no income whatever in 1972," 415 U.S. at 714. Such an individual would qualify as "indigent" under any metric.

Plaintiffs finally invoke the district court's opinion denying the State's stay motion, *see* Gruver Br. 35, 43 n.26; Raysor Br. 35–36, which purported to find as fact that the Florida Legislature's motive in enacting SB-7066 was to "favor individuals with money over those without," A1179. But the district court's belated attempt to pour the foundation for a structure that it had already built is utterly meritless: the court lacked jurisdiction to make this factual finding[1] and attributed discriminatory intent to the Legislature based on mere knowledge of disparate outcomes. The finding is clearly erroneous in any event. *See* Opening Br. 18–19. Further, SB-7066's provision requiring that felons complete the financial terms of their sentences was mandated by Amendment 4. *See Advisory Op. to the Governor re: Implementation of Amendment 4*, 288 So. 3d 1070, 1075 (Fla. 2020). So, the

[1] Plaintiffs argue the district court "was merely reciting facts it had already found." Raysor Br. 36 n.16. But Plaintiffs cite no such finding in the record, because there is none.

Legislature had no discretion on the issue. And the notion that the voters of Florida were motivated by an insidious desire to harm impecunious felons when they offered all felons (except those convicted of murder or a felony sexual offense) a path back into the body politic is simply preposterous.

B. Amendment 4 and SB-7066 Need Only Satisfy Rational-Basis Review.

1. *Harper* Is Inapplicable.

"The right of convicted felons to vote is not 'fundamental,' " as "[t]hat was precisely the argument rejected in *Richardson* [*v. Ramirez*, 418 U.S. 24 (1974)]." *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983); *see also, e.g.*, *Medina v. Whitaker*, 913 F.3d 152, 160 (D.C. Cir. 2019); *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010); *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.); *Madison v. State*, 163 P.3d 757, 768–69 (Wash. 2007) (en banc); *Baker v. Cuomo*, 58 F.3d 814, 820 (2d Cir. 1995); *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978); *Upshaw v. McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970).

Plaintiffs argue that, under *Harper*, a State law concerning a felon population *without* the right to vote and drawn along wealth-*neutral* lines is nonetheless unconstitutional *if* the law incidentally prevents felons unable to pay the financial terms of their sentences from *obtaining*—not exercising—the ability to vote. Such a

radical expansion of felon voting rights cannot be justified by *Harper* or any other precedent.

Plaintiffs contend that *Harper* did not depend on the fundamental character of the right to vote held by the Virginia electorate. *See* Gruver Br. 19–20; Raysor Br. 19–20. That is erroneous. *See Madison*, 163 P.3d at 770. *Harper* emphasized that "the political franchise of voting [i]s a fundamental political right, because preservative of all rights," 383 U.S. at 667, and that "the right of suffrage is a fundamental matter in a free and democratic society," *id.*; *see also id.* at 670. The Supreme Court has cited the decision numerous times for the proposition that the right to vote is a "fundamental right." *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 7–8 (1974); *see also, e.g.*, *M.L.B.*, 519 U.S. at 124 n.14. This Court likewise has stated that *Harper* "acknowledged that the right to vote is a fundamental right." *Duke v. Cleland*, 954 F.2d 1526, 1531 (11th Cir. 1992).

Unlike other citizens, however, a felon's right to vote is *not* fundamental; he may be permanently stripped of the right upon conviction. That is the teaching of *Richardson*. The fundamental right to vote acknowledged in *Harper* thus does not extend to felons. This does not mean that States have "carte blanche to discriminate among those with convictions." Raysor Br. 20. Reenfranchisement schemes are subject to the same constitutional rules applicable to all statutory benefits, from welfare to driver's licenses: If they are distributed along suspect lines, *see Graham v.*

Richardson, 403 U.S. 365, 372 (1971), or are enacted with a discriminatory purpose against a suspect class, *see Feeney*, 442 U.S. at 279, they are subject to heightened scrutiny; otherwise, they are reviewed for mere rationality, *see Ortwein v. Schwab*, 410 U.S. 656, 660 (1973).

Plaintiffs nonetheless assert that "nothing in *Harper*'s analysis turned on the assumption that those who would be unable to pay the fee *personally* had a fundamental right to vote." Gruver Br. 19. This fundamentally misreads *Harper*, which held that citizens "otherwise qualified to vote" could not be required to pay Virginia's poll tax. 383 U.S. at 668. And it eviscerates settled doctrine that litigants generally can assert only their own rights. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). It would allow a plaintiff to invoke the level of scrutiny applicable to the invasion of a right held only by *others* even when the law in question affects *only* persons who lack the relevant right.

While Plaintiffs assert that *Harper* held that "wealth is never germane to voting qualifications," Raysor Br. 32, it is *their* position that makes wealth "germane" to voting qualifications. Consider two felons, Felon A and Felon B, with identical circumstances—same crime, same financial penalty—except that Felon A can pay the fine immediately, while Felon B cannot. Under Plaintiffs' theory, the State can demand that Felon A pay the fine to vote, but cannot make the same demand of Felon B because of his lack of wealth.

The foregoing hypothetical exposes an intractable deficiency in Plaintiffs' appeal to *Harper*. While Plaintiffs have consistently maintained that Amendment 4 and SB-7066 are unconstitutional under the Equal Protection Clause *as applied to those unable to pay*, they (and the district court) have assumed that requiring payment by felons who are able to pay does not run afoul of the Fourteenth Amendment. But *Harper* invalidated *categorically* the Virginia law that made wealth "an electoral standard." 383 U.S. at 666; *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 118 (1973) (Marshall, J., dissenting); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009).

Plaintiffs' interpretation of *Harper*, meanwhile, would require a State to consider the wealth of its felons and require full completion of all terms of sentence only from those felons with adequate financial means. Plaintiffs offer no explanation for how overt discrimination between felons of different financial means is *demanded* by the Equal Protection Clause, especially if wealth is never "germane" to voting. "The Fourteenth Amendment . . . does not require what it barely permits." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir. 1997).

Finally, even accepting that "wealth is never germane to voting qualifications," the classification drawn by Amendment 4 and SB-7066 is not, we repeat, between felons who have wealth and those who do not, but rather between felons who complete all terms of their sentences and those who do not. And nothing

could be more directly germane to *restoring* the right to vote to someone who lost it *as a consequence of his conviction of a felony* than whether he has paid the debt he owes to society *as a consequence of his conviction of a felony*.

2. Heightened Scrutiny Is Not Justified Under *Griffin* or *Bearden*.

Plaintiffs assert that Amendment 4 and SB-7066 "punish" felons for their inability to complete their financial terms of sentence. But Amendment 4 and SB-7066 do not punish *anyone*. A felon is disenfranchised by virtue of his criminal sentence, and under Florida's Constitution (as it existed *before* Amendment 4) that persists unless and until the felon's rights are restored. *See* Fla. Const. art. VI, § 4(a). Amendment 4 and SB-7066 create a conditional opportunity for some felons to restore their rights; none are made worse off. While some felons may be unable to take advantage of the laws' benefits, the failure to qualify for a government benefit is not "punishment." *See, e.g.*, *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

Nonetheless, Plaintiffs insist that cases like *Griffin v. Illinois*, 351 U.S. 12, and *Bearden v. Georgia*, 461 U.S. 660, require heightened scrutiny. *Griffin* involved "access to judicial processes in cases criminal or quasi criminal in nature." *M.L.B.*, 519 U.S. at 124. Plaintiffs try to widen *Griffin*'s ambit by misreading *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), which rejected an indigent arrestee's Fourteenth Amendment challenge to a city's pretrial bail system. They claim that the dissent "argued that *Griffin* should be confined to access to judicial

process," and that the majority rejected that limitation as "unprincipled" and "ad hoc." Raysor Br. 28. But the majority condemned the dissent's analysis as "unprincipled" and "ad hoc" because *if* Walker's claim—entirely unrelated to judicial process—could somehow fit into *Griffin*'s exception, *then* it would be unprincipled to deny such treatment to "any government action that treats people of different means differently." *Id*. *Walker*, therefore, *rejected* expanding *Griffin* to *avoid* having to draw unprincipled lines.

Plaintiffs attempt to synthesize the *Griffin* access-to-process cases with other cases, like *Williams*, *Bearden*, and even *Harper*, to construct a broad rule demanding heightened scrutiny in seemingly any case where criminal justice and wealth intersect. But classifying decisions like *Williams*, *Bearden*, or *Harper* as part of a "*Griffin* line of cases" is akin to characterizing any decision striking down a federal statute as part of a "*Marbury* line of cases." Although the cases recite *Griffin*'s "basic command that justice be applied equally to all persons," *Williams*, 399 U.S. at 241, their analyses are not interchangeable, nor do they entail that *Griffin*'s "basic command" demands heightened scrutiny in all cases where the criminal (or civil) justice system implicates wealth.

Rather, as Plaintiffs seem to concede, *see* Gruver Br. 24; Raysor Br. 27, the central connection between the Court's access-to-judicial-process cases and the *Williams-Bearden* line of imprisonment cases is that in both "[d]ue process and equal

protection principles converge in the Court's analysis." *Bearden*, 461 U.S. at 665. Plaintiffs read *Bearden*'s discussion of this point to mean that due process and equal protection converge "when[ever] people are treated differently based on their wealth." Gruver Br. 24. This is wrong; the Court has expressly rejected that wealth-discrimination claims are, as a matter of course, entitled to heightened scrutiny. *See Rodriguez*, 411 U.S. at 28–29.

Nor does every wealth-discrimination case implicate both equal protection and due process. *Williams* implicated both because imposing a "period of imprisonment beyond the statutory maximum solely by reason of [a defendant's] indigency" deprives a person of the fundamental liberty interest against unjustified physical restraint. 399 U.S. at 241–42. And both clauses were implicated by the revocation of probation in *Bearden* because "considerations of procedural and substantive fairness" drawn from the Due Process Clause attach "to probation and parole revocation proceedings." 461 U.S. at 667 n.7; *see also Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973). The same due process conditions also attend the right to pretrial bail at issue in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc). *See Meechaicum v. Fountain*, 696 F.2d 790, 791–92 (10th Cir. 1983); *see also Steele v. Cicchi*, 855 F.3d 494, 502 (3d Cir. 2017).

In *Williams*, *Bearden*, and *Rainwater*, therefore, the liberty interest held by the indigent defendant carried with it independent, substantive protections under the

Due Process Clause above and beyond the minimal rational-basis standard every law must satisfy. *See Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 945 (11th Cir. 2013). Here, by contrast, felons' interest in reenfranchisement is the same as an interest in a "statutory benefit." *Harvey*, 605 F.3d at 1079. Because due process does not converge with equal protection here, heightened scrutiny is inappropriate.

Finally, *Bearden*'s rationale rested on the principle that once a State determines that its "penological interests do not require imprisonment" for the substantive offense it cannot then impose that punishment for failure to pay a fine because of indigency. 461 U.S. at 670. Plaintiffs assert that this characterization of *Bearden* would permit a State to punish a felony offense with incarceration until any financial penalties are paid off, so long as the State claimed its penological interests required it. *See* Gruver Br. 31. This hypothetical "debtor's prison" approach is irreconcilable with the constitutional requirement "that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." *Williams*, 399 U.S. at 244.

Plaintiffs' hypothetical also exposes why *Williams* and *Bearden* do not control here. Freedom from bodily restraint "has always been at the core of the liberty protected by the Due Process Clause" because incarceration is uniquely destructive of other basic rights. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Disenfranchisement, like a fine, "may engender a significant infringement of

personal freedom, but [it] cannot approximate in severity the loss of liberty that a prison term entails." *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 542 (1989) (cleaned up); *see also, e.g.*, *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003).

This difference explains why a State may lawfully make permanent disenfranchisement a mandatory minimum punishment for every felony, *see Richardson*, 418 U.S. at 58, but may not similarly impose permanent *imprisonment* across the board. *Williams* and *Bearden*—informed by the due-process protections for liberty from physical restraint—should not be extended beyond imprisonment.

C. Amendment 4 and SB-7066 Satisfy Rational-Basis Review.

Plaintiffs advance two basic rational-basis arguments. First, they maintain that Florida's reenfranchisement laws are irrational as applied to felons unable to pay. *See* Gruver Br. 37–38. Second, they maintain that it is irrational to demand that *any* felons complete the financial terms of their sentences to regain their eligibility to vote. *See* Gruver Br. 39–44; Raysor Br. 36–39. Both are meritless.

Plaintiffs deny that rational-basis review focuses on the rationality of the classification drawn by the State, rather than the rationality of applying that classification to any individual. *Cf. Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 85–86 (2000) ("[T]he constitutionality of state classifications on the basis of age cannot be determined on a person-by-person basis."). Instead, they assert that "the first step for determining an equal-protection classification in a wealth-discrimination case is to

evaluate the restriction as-applied to those who cannot pay." Gruver Br. 38. But the case they cite—*Williams*—appeared to concede that the State's policy was rational, *see* 399 U.S. at 238–39, but struck it down under heightened scrutiny.

Nor do Plaintiffs' other cases support them. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), is clearly distinguishable. *See* Opening Br. 34. And *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976), struck down a double-bond requirement because the classification itself, which "treat[ed] those financially unable to obtain the bond differently from those able to do so," *Saharoff v. Stone*, 638 F.2d 90, 92 (9th Cir. 1980), bore "no rational relationship to the payment of interest on the award and costs of appeal," *O'Day*, 536 F.2d at 860.

The People of Florida and the Florida Legislature have concluded that felons who put the scales of justice back in balance by completing all terms of sentence, including financial terms, should be allowed to rejoin the electorate. That interest in rewarding only felons who have paid their full debt to society is legitimate. *See, e.g.*, *Harvey*, 605 F.3d at 1067; *Owens*, 711 F.2d at 28; *Madison*, 163 P.3d at 771.

The only remaining question is whether Amendment 4 and SB-7066 have some rational connection to the Florida electorate's purpose of reenfranchising felons who complete their terms of sentence. They plainly do. Indeed, the fit is perfect, regardless of whether the proportion of felons able to complete their

sentence is 75%, 50%, 25%, or 0%. *Cf.* A687 (estimating that more than 20% of otherwise eligible felons had no outstanding financial terms at all).[2]

Finally, Plaintiffs assail the State's "first-dollar" policy as "negat[ing] whatever interest the State might claim in ensuring completion of sentence." Gruver Br. 43; *see* Raysor Br. 37–38. But the policy promotes administrability by making it easier to track felon payments while demanding that felons pay the monetary amounts set forth in their sentencing document before regaining eligibility to vote. *See* Opening Br. 38–39. The State's decision to *favor felons* in interpreting "completion of all terms of sentence" is reasonable. And if it were not, the proper remedy would be to enjoin *the first-dollar policy* to make the law *better* comport with the interests reflected in Amendment 4 (a job for the State's courts), not to enjoin the law to eviscerate those interests altogether.

II. Amendment 4 and SB-7066 Do Not Impose Taxes Prohibited by the Twenty-Fourth Amendment.

A. The Twenty-Fourth Amendment Does Not Apply.

First, Plaintiffs' contention that the Twenty-Fourth Amendment applies to Florida's reenfranchisement laws ignores both the text of the amendment and the

[2] Plaintiffs misconstrue (Gruver Br. 40; Raysor Br. 37) the State's discussion of its subsidiary revenue-collection interest during the preliminary-injunction proceedings. *See* Appellants' Br. 29, No. 19-14551, *Jones v. DeSantis* (11th Cir. Dec. 13, 2019). That interest, in any event, does not call into doubt the rationality of Amendment 4 and SB-7066 in terms of their relation to other government interests.

dispositive fact that felons forfeited their right to vote when they were convicted of felonies. The text of the Twenty-Fourth Amendment provides that the "right of citizens . . . to vote . . . shall not be denied or abridged by . . . any State *by reason of failure to pay any poll tax or other tax*." U.S. Const. amend. XXIV, § 1 (emphasis added). Plaintiffs were denied their right to vote, constitutionally, by reason of their felony convictions, *see Richardson*, 418 U.S. at 54–56, not for any failure to pay a tax. This case is not about the *denial* of Plaintiffs' voting rights, but rather is about the decision of Florida's voters to *conditionally restore* their (and other felons') voting rights, and the Twenty-Fourth Amendment simply has nothing to do with it.

Second, the import of *Richardson* is that felons, by reason of Florida's indisputably constitutional law barring felons from voting upon conviction, no longer have the right to vote, and any decision to restore the right is an act of grace. *See Harvey*, 605 F.3d at 1080; *Johnson*, 624 F.3d at 751; *cf. Howard v. Gilmore*, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000). Plaintiffs argue that the uniform decisions of other circuits adopting this reading of *Richardson* should be ignored because they contain "scant analysis." Gruver Br. 65. But the logic of these decisions is as simple as it is irrefutable, and few words are necessary to express it.

Plaintiffs insist that facially unconstitutional hypothetical reenfranchisement schemes would pass constitutional muster if felons are unable to bring challenges under the Twenty-Fourth Amendment. *See* Gruver Br. 55–56; Raysor Br. 58. But

the State has never contended that it is constitutionally unrestrained in the qualifications it can set for restoration. Indeed, the State has acknowledged that reenfranchisement schemes are subject to the Equal Protection Clause. The State's position thus is that of Justice O'Connor, who emphasized both that felons "have no cognizable Twenty–Fourth Amendment claim until their voting rights are restored," *Harvey*, 605 F.3d at 1080, and that the "statutory benefit" of reenfranchisment could

> run afoul of the Equal Protection Clause . . . if it confer[red] rights in a discriminatory manner or distinguishe[d] between groups in a manner that [was] not rationally related to a legitimate state interest. For instance, a state could not choose to re-enfranchise voters of only one particular race, or re-enfranchise only those felons who are more than six-feet tall.

Id. at 1079 (citations omitted).

None of the hypothetical statutes posited by Plaintiffs would survive constitutional scrutiny for their respective classifications. A reenfranchisement scheme limited to white felons would not satisfy strict scrutiny. Nor would reenfranchising only male felons satisfy intermediate scrutiny. Finally, a law restoring the right to vote to felons over a certain age would fail rational-basis review because such an arbitrary classification would not further *any* conceivable legitimate interest.

B. Court Costs and Fees Are Not Unconstitutional Taxes.

Plaintiffs assert that the district court's "factual findings" regarding the revenue-raising, rather than punitive, nature of court costs and fees qualify them as

taxes. *See* Gruver Br. 59, 62; Raysor Br. 45. But the district court could not find as a "fact" that court costs and fees have the primary purpose of raising revenue rather than punishment, for the only evidence to support such a finding would come from interpreting the statutes imposing costs and fees, which is a legal rather than a factual endeavor. *See, e.g.*, *United States v. McLean*, 802 F.3d 1228, 1246 (11th Cir. 2015). Moreover, such a "finding" would nullify the application of the functional approach for distinguishing taxes from penalties. *Cf. NFIB v. Sebelius*, 567 U.S. 519, 565–70 (2012). Even if the district court did make such a finding, the State has demonstrated that it is clearly erroneous because court costs and fees constitute punishment. *See* Opening Br. 46–50.

Plaintiffs cherry-pick passages from Supreme Court precedent in support of their insistence that court costs and fees constitute "taxes" because they produce revenue for the Government. *See* Gruver Br. 59; Raysor Br. 42–43. But they cannot escape the well-settled and dispositive principle that "[i]n distinguishing penalties from taxes, . . . if the concept of penalty means anything, it means punishment for an unlawful act or omission." *NFIB*, 567 U.S. at 567; *see United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996); *United States v. La Franca*, 282 U.S. 568, 572 (1931); *Lipke v. Lederer*, 259 U.S. 557, 561–61 (1922).

That a criminal penalty generates revenue for the Government does not make it a tax. *See Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 778 (1994) (noting that both criminal fines and taxes generate revenue).[3] Indeed, when an exaction even "approaches punishment," it crosses the line separating revenue-raising from punitive purposes. *Id.* at 779–80; *see also Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922). And a levy "conditioned on the commission of a crime" demonstrates a punitive purpose, for "[t]hat condition is significant of penal and prohibitory intent rather than the gathering of revenue." *Kurth Ranch*, 511 U.S. at 782 (quotation omitted).

Indeed, the Court in *Kurth Ranch* further explained that "[t]axes imposed upon illegal activities" are punitive because the Government's justifications for merely discouraging rather than criminalizing conduct "vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction." *Id.* Thus, an exaction "imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment." *Id.*

The Court's analysis in *NFIB* is not to the contrary. There, the Court determined that while the individual mandate encouraged the purchase of health

[3] Although *Kurth Ranch* analyzed the exaction for double-jeopardy purposes, it is instructive because it applied the same principles as *NFIB*'s functional approach. *See* 511 U.S. at 778–83; *see also NFIB*, 567 U.S. at 566, 573 (citing *Kurth Ranch*).

insurance, it did not "declare that failing to do so is unlawful," nor did it "attach[] negative legal consequences to not buying health insurance." 567 U.S. at 567–58.

While this should end the inquiry, even if the additional considerations outlined in *NFIB* applied, they too would support a finding that court costs and fees are punitive. *See* Opening Br. 47–50.

First, although court costs and fees are normally modest, this does not, by itself, render them taxes. *Cf. Kurth Ranch*, 511 U.S. at 780–81. Second, Plaintiffs fail to rebut the proposition—amply supported by Florida law—that court costs and fees are tied to culpability. Court costs and fees are not imposed on felony defendants who are acquitted, but only on felony defendants who receive a criminal penalty, including probation. Regardless of whether a defendant is convicted by a jury or pleads guilty, pleads no-contest, or has adjudication withheld, he is subject to punishment by the State. *See* Opening Br. 47–48.

Plaintiffs' only response is to argue that a court withholds adjudication for the purpose of withholding punishment. Gruver Br. 61–62; Raysor Br. 44. But the determination that a defendant, although found to have committed a crime, need not "suffer the penalty imposed by law," Fla. Stat. § 948.01(2), does not mean that a court cannot impose *any penalties* when withholding adjudication. Indeed, a judge cannot withhold adjudication for a felony charge without placing the defendant on probation. *See id.* Moreover, a trial court withholding adjudication can also impose

a criminal fine. Fla. Stat. § 948.011; *Clinger v. State*, 533 So. 2d 315, 316 (Fla. Dist. Ct. App. 1988). Thus, the penalties a defendant avoids in having adjudication withheld are terms of imprisonment and the loss of civil rights from a felony conviction. *See Clarke v. United States*, 184 So. 3d 1107, 1115 (Fla. 2016). Indeed, "sentence is withheld solely to aid in the rehabilitation of a party whose guilt has been established." *Peters v. State*, 984 So. 2d 1227, 1232 (Fla. 2008). That a sentencing judge does not impose some of the penalties available when adjudication is withheld negates neither the defendant's culpability nor the punitive nature of court costs and fees.

Second, Plaintiffs repeat the district court's assertion that court costs and fees "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." Raysor Br. 44–45. So what? Under Florida law, "the fact that one method for enforcing [a type of court cost] is by civil means does not alter the criminal nature of the sanction." *Martinez v. State*, 91 So. 3d 878, 880 n.2 (Fla. Dist. Ct. App. 2012).[4] In any event, criminal fines, which even the district court and

[4] Plaintiffs also contend that *Martinez* "is not dispositive" because the court "examined only *a single* type of fee" and "failed to consider several *NFIB* factors." *See* Gruver Br. 62. This misses the point. *Martinez* exposes the error in the position that all court costs and fees are taxes because they are not punitive, *see* A1108–A1112, as it determined that at least one commonly imposed cost constitutes punishment for double jeopardy purposes. *See* 91 So. 3d at 880. It cannot be true

Plaintiffs concede are penalties, are collected in the same way as court costs and fees. *See* Fla. Stat. § 28.246.

Court costs and fees, then, are not materially distinguishable from fines. All are imposed as part of a sentence, are attached to culpability, are generally used to defray the costs of the criminal justice system, and are collected the same way. *See* Opening Br. 48–49. The only relevant distinguishing characteristic is that a judge does not have discretion over the imposition of court costs and fees but does have a say in imposing *some*—but not all—fines. *See* A1151 (acknowledging mandatory fines for some offenses). Plaintiffs contend that fines are different because they are offense-specific whereas court costs and fees apply to all defendants. *See* Gruver Br. 63; Raysor Br. 45 n.22. But they fail to explain how this meaningfully distinguishes the two exactions, especially given that "punishment for an unlawful act or omission" is a penalty. *NFIB*, 567 U.S. at 567. That the Legislature has decided to impose fixed penalties in the form of court costs and fees on the commission of *all* felonies and additional penalties in the form of fines on only *some* offenses provides no basis for finding that the former are nonpunitive. Rather, such costs and fees are in the nature of mandatory minimum penalties for committing a felony.

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that a court cost can qualify as both a sanction under the Double Jeopardy Clause and a nonpunitive tax.

See Opening Br. 49; *see also* Gruver Br. 61 (conceding that the "crucial point" for evaluating court costs and fees "is not the sameness of the fee").

Finally, Plaintiffs attempt to distinguish the rulings of other circuits on the ground that those courts did not address the issue of costs and fees or the question whether the obligations in question (criminal fines, restitution, and child support payments) constituted "other tax[es]." Gruver Br. 64–65. But the reasoning of those cases is sound and applies here. As the Sixth Circuit explained, a State can "permissibly limit[] the vote to individuals without felony convictions, and lawfully condition[] the restoration of voting rights on satisfaction of such court-ordered obligations that exist independently of the re-enfranchisement statute or any tax law violations." *Johnson*, 624 F.3d at 751. And *Harvey* similarly stated "that restoration of [disenfranchised felons'] voting rights requires them to pay all debts owed under their criminal sentences does not transform their criminal fines into poll taxes." 605 F.3d at 1080.

III. Florida's Reenfranchisement Laws Comport With Due Process.

A. Florida's Reenfranchisement Scheme Does Not Violate Procedural Due Process.

Plaintiffs insist that the district court adjudicated their due-process claims. *See* Raysor Br. 45 n.23; Gruver Br. 44 n.27. While the State continues to believe it did not, *see* Opening Br. 51, at a minimum the district court's remedy principally was designed to rectify the court's wealth-discrimination holding and only incidentally

addressed its due process concerns, *see* A1131. That remedy therefore is not tailored to a due-process claim shorn of a successful wealth-discrimination claim. For example, absent the district court's wealth-discrimination holding, there is no reason to include an ability-to-pay component in the prescribed advisory-opinion process. *See* A1153.[5]

Separating the district court's erroneous wealth-discrimination holding from the due-process considerations alters the analysis significantly. That is because "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976); *see also J.R. v. Hansen*, 736 F.3d 959, 966 (11th Cir. 2013). Thus, a "process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985). The district court found that the "overwhelming majority" of otherwise eligible felons "are genuinely unable to pay the required amount" to complete the financial terms of their

[5] Even if Plaintiffs' due-process claims had merit, the proper remedy would have been for the district court to order the State to develop an appropriate administrative process, not for the district court to design that process itself, down to the form to be used when applying for an advisory opinion. *See Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020). Indeed, relief such as that ordered by the district court "raise[s] serious federalism concerns, and it is doubtful that a federal court [has] authority to order it." *Jacobson v. Florida Secretary of State*, 957 F.3d 1193, 1212 (11th Cir. 2020).

sentences. A1075–A1076. If these factual findings are correct, there is zero risk of improper deprivation of voting eligibility for the "overwhelming majority" of felons—including every member of the wealth-discrimination subclass, *see* A669—because regardless of how much process is given to a felon who is unable to pay the financial terms of his sentence, that felon will remain ineligible to vote. Thus, it follows that Plaintiffs have not met the burden of demonstrating that additional process is warranted for the "generality of cases." *Mathews*, 424 U.S. at 344. There is nothing "stunning" about this argument, Raysor Br. 52, as it simply applies well-established due-process principles to the facts of this case.

The first step under *Mathews* is to identify the interest at risk of deprivation. As an initial matter, it is essential to understand that the risk of deprivation from an erroneous eligibility decision in the voting-rights context is a two-way street. In the typical due process context, the applicant for a government benefit (e.g., social security, unemployment benefits, etc.) bears all the meaningful risk of an erroneous administrative eligibility decision. But here, the interests of all other voters are also at stake in each eligibility decision. An erroneous decision *against* eligibility denies reenfranchisement to the felon. But an erroneous decision *in favor* of a felon's eligibility necessarily results (assuming the felon then votes) in a dilution of the votes of all eligible voters. This harm is serious and irreparable. "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote

just as effectively as by wholly prohibiting the free exercise of the franchise." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (cleaned up).

Plaintiffs argue that the relevant interest at risk of deprivation is their right to vote. *See* Raysor Br. 46. But for felons, voting is "a mere benefit"—akin to unemployment benefits—"not a fundamental right." *Harvey*, 605 F.3d at 1079. The interest Plaintiffs actually seek to protect is the ability to require state election officials to serve as felons' private investigators to track down facts *personal to the felons* that the felons failed to keep track of themselves—the financial terms of their sentences and the payments they have made toward satisfying them. And this is despite the fact Florida election officials, unlike the felons themselves, were not involved in the felons' criminal sentencing proceedings (which could have taken place in federal court or the courts of another state), nor in the felons' payments toward their sentences (which may have been to the Federal Government, another state, or a victim).

That this is the true interest at stake is demonstrated by what Plaintiffs evidently take to be their strongest case: felons who have completed the financial terms of their sentences but do not know it. *See* Raysor Br. 46.[6] Such felons are outside the definition of the class certified by the district court, *see* A669, and

[6] The conclusions of this paragraph also are true for the other group of felons of unknown size for whom any process would not be futile—those who could afford to pay the financial terms of their sentences but do not know how much they owe.

Plaintiffs have not attempted to show that they are numerous. What is more, the State is doing nothing to deprive these felons of voting eligibility. To the extent such felons are not registering and voting, it allegedly is because they are chilled by Florida's criminal laws against fraudulent registration and voting. *See* Gruver Br. 49–50; Raysor Br. 48, 52.

Laws against fraudulent attempts to obtain government benefits are not unusual. It is a felony under Florida law, for example, to make "a false statement or representation, knowing it to be false . . . to obtain or increase" unemployment benefits, Fla. Stat. § 443.071(1), and no one, to our knowledge, has ever suggested that the Due Process Clause requires the relevant State officials to provide a pre-application investigation into whether the applicants' own unique personal factual circumstances qualify them for benefits. And in the voting context, any chill is caused by prosecutors, not election officials. What Plaintiffs seek from the State is not to forgo prosecution of felons—the Governor and Secretary are not prosecutors—but for the State to track down information about felons' own factual circumstances. Plaintiffs have cited no authority for the proposition that the Due Process Clause protects any such interest. *Kapps v. Wing*, 404 F.3d 105 (2d Cir. 2005), for example, merely held that benefit applicants had an interest in demonstrating their eligibility, not an interest in having the government do their factual investigation for them. *See id.* at 117–18.

Mathews step two—the risk of erroneous deprivation—also cuts decisively against Plaintiffs. The State does not claim an interest "in withholding eligibility information," *contra* Raysor Br. 53, and indeed the district court's injunction does not provide felons with *any* information beyond what already is available to felons through existing State procedures. Under the State's advisory-opinion process, felons who are unsure about their eligibility to vote can ask the State for a determination regarding their eligibility. *See* A997; Fla. Stat. § 106.23(2); Fla. Admin. Code R. 1S-2.010. Because SB-7066 controls that inquiry, the Division of Elections follows the same process it would in determining whether voters should be removed from the rolls, including "obtain[ing] and review[ing]" relevant information. *See* Fla. Div. of Elections, *Constitutional Amendment 4/Felon Voting Rights*, Fla. Dep't of State, https://bit.ly/3fFIYC1 (last visited Aug. 10, 2020); *see also* Fla. Stat. § 98.0751(3)–(4).

The Division evaluates a felon's eligibility based on "credible and reliable" information available to it, either from the felon or from State and Federal criminal justice authorities. *See* Fla. Stat. § 98.0751(3)(a). And the Division "strictly construe[s]" SB-7066's requirements "in favor of the [felon]." *Id*. § 98.0751(4). The Division by law therefore must resolve any legitimate doubt regarding the amount owed or paid in favor of finding an obligation satisfied and the felon eligible. To use one of Plaintiffs' examples, Raysor Br. 48, if the Division could not determine

whether an outstanding fine in a criminal sentence is for a misdemeanor or a felony, it would inform the requesting felon that the fine does not bar the felon from registering. The Division is required to respond to such requests "in a timely manner," and felons can request expedited treatment. Fla. Admin. Code R. 1S-2.010(4)(i), (5)(a).[7] A felon acting in good faith upon an advisory opinion is shielded from prosecution. *See* Fla. Stat. § 106.23(2), 106.27(1); State's Suppl. App. 1–6.

The district court's injunction alters this process in two ways, neither of which reduces the likelihood of erroneous deprivations. First, the district court drastically *reduced* the amount of information felons are required to provide when requesting an advisory opinion. Under existing regulations, an advisory-opinion request must contain the following:

> (a) Name of Requestor.
> (b) Address of Requestor.
> (c) Statutory provision(s) of Florida election law on which advisory opinion is sought.
> (d) Description of how this statutory provision may or does affect the requestor.
> (e) Possible violation of Florida election laws on which advisory opinion is sought.
> (f) The precise factual circumstances giving rise to the request.

[7] The State has *not* "acknowledge[d] [the Division] may take months—or ultimately decline—to decide whether a citizen is eligible . . . ." *Contra* Raysor Br. 9. When asked at trial if it could "take months" to issue an opinion on a difficult issue—which is a highly unrepresentative case—Director Maria Matthews responded that it was "possible," as it "depends on the complexity of the issue," and further explained that the rule requires a written response "in a timely manner." A1001.

(g) The point(s) on which the requestor seeks an opinion.
(h) Additional relevant information.
(i) Statement, if any, to expedite division's response.

Fla. Admin. Code R. 1S-2.010(4).

The form accompanying the district court's injunction, by contrast, requires felons to place a check mark indicating "I request a statement of the amount of any fine or restitution that must be paid to make me eligible to vote and an explanation of how the amount was calculated" and to provide either a street address or an email address. *See* A1159. It does not even include a space for the felon's name. Depriving the Division of Elections of essential information will frustrate its ability to investigate a felon's eligibility. And the form builds on the district court's erroneous Twenty-Fourth Amendment judgment, as it does not even allow a felon to request fee and cost information. A statement of outstanding fines and restitution alone will not allow a felon to determine his eligibility to vote.

Second, the district court's injunction provides that if the Division does not respond within 21 days, a felon can "rely on the Division's failure" to register and vote. A1147. The flaws in this, however, are twofold. First, it guarantees that some, likely very many, felons will be erroneously presumed eligible to vote and that their votes will irreparably harm eligible Florida voters by diluting their votes. Second, the order does not address the source of Plaintiffs' alleged injury, which is the "chill" caused by a risk of prosecution. No State or county prosecutor is a party to this

lawsuit. Indeed, the district court correctly acknowledged that its injunction "does not reach nonparties and thus does not bind the various state attorneys." *Id.*; *see Jacobson v. Florida Secretary of State*, 957 F.3d 1193, 1209–10 (11th Cir. 2020). The district court's injunction, therefore, does not eliminate the chill allegedly preventing some potentially eligible felons from registering.

Mathews step 3—the State's interests, administrative and otherwise—also favors the State. The State has an interest in avoiding the extra work it will have to do to investigate with reduced information from felons. And it also has an interest in avoiding having felons presumed eligible to vote before an investigation can reasonably be completed, as that would pose a substantial risk of authorizing *ineligible* felons to vote. For example, assume a felon who knows he owes an amount that he cannot immediately afford to pay, but he wants the State's assistance in determining exactly what that amount is, so he submits an advisory-opinion request under the district court's injunction. Assume also that the felon's case involves multiple felonies that are decades old and are from multiple jurisdictions, such that the State's investigation takes longer than 21 days. Under the district court's injunction, the State would not be able to "take any step to prevent, obstruct, or deter [such a felon] from registering to vote and voting" due to his outstanding financial terms of sentence. A1152–A1153. This makes no sense, and the prospect of emboldening ineligible felons to vote, and thus diluting the votes of eligible voters,

is a substantial risk created by the district court's injunction. *See Purcell*, 549 U.S. at 4. The district court's injunction threatens the integrity of Florida's electoral process by potentially providing support for ineligible felons to vote.

B. Neither the Criminal Statutes Regarding Illegal Registration and Voting Nor SB-7066 Are Void for Vagueness.

"The vagueness doctrine applies only to laws that prohibit conduct and fix punishments." *United States v. Matchett*, 802 F.3d 1185, 1189 (11th Cir. 2015); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (plurality). Plaintiffs' argument that SB-7066 is unconstitutionally vague is thus a nonstarter, for the statute imposes no sanctions or penalties. Indeed, the *only* authority Plaintiffs cite to support applying vagueness principles to SB-7066—a solo concurrence by Justice Gorsuch—discusses the doctrine's application to civil *penalties*. *See Dimaya*, 138 S. Ct. at 1229. SB-7066 does not "impose[] a civil penalty of disenfranchisement," Raysor Br. 56, because it disenfranchises *no one*. Rather, SB-7066 works only to *restore the franchise* to certain felons.

Furthermore, Plaintiffs cannot point to any provision in SB-7066 that is facially vague, as the statute defines "completion of *all* terms of sentence" as including the completion of financial terms. Fla. Stat. § 98.0751(2)(a). And the State has remedied any ambiguity regarding how payment is calculated through the adoption of the first-dollar policy. *See Ward v. Rock Against Racism*, 491 U.S. 781, 795–96 (1989).

Plaintiffs' real vagueness complaint is not that the *meaning* of the criminal statutes regarding registration and voting are unclear, or even that the meaning of SB-7066 is unclear. Rather, Plaintiffs' complaint is that they claim felons are unsure about their own individual *factual* circumstances regarding eligibility. *See* Gruver Br. 45–47; Raysor Br. 55–56. But "a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to *what fact must be proved*." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (emphasis added); *see also United States v. Williams*, 553 U.S. 285, 306 (2008).

Thus, the vagueness doctrine applies to statutes that sanction conduct based entirely on "subjective judgments without statutory definitions, narrowing context, or settled legal meaning," such as laws penalizing "annoying" or "indecent" behavior. *Williams*, 553 U.S. at 306. No such indeterminacy exists when the prohibited conduct is based on "clear questions of fact," *id.*, such as whether an otherwise eligible felon has completed "all terms of sentence." Plaintiffs' vagueness argument collapses once this false premise is corrected, for the criminal statutes regarding illegal registration and voting are clear regarding what conduct is prohibited: a person "*willfully* submit[ting] any false voter registration information," Fla. Stat. § 104.011(2) (emphasis added), or "*willfully* vot[ing] [in] any election" "*knowing* he or she is not a qualified elector," *id.* § 104.15 (emphases added). Thus, Plaintiffs' assertions regarding alleged difficulties in determining eligibility in some

instances, *see* Gruver Br. 48 (citing Plaintiff Tyson's highly unrepresentative case), or Director Maria Matthews's testimony regarding the application of SB-7066 to certain cases, *see* Gruver Br. 48; Raysor Br. 55–56, are irrelevant to the vagueness inquiry.[8]

Plaintiffs assert that " 'the clarity of the statutory words is meaningless' when the words cannot be applied to 'known or knowable facts.' " Gruver Br. 47 (quoting A1130). But neither of the two cases they cite involved a statute that provided clear guidance as to the prohibited conduct but was found vague because individuals had difficulty applying extant factual circumstances to that standard. *Watkins v. United States*, 354 U.S. 178 (1957), found that the ambiguity of a provision as applied to the defendant could not be cured even after consulting "several possible indicia" of its meaning. *See id.* at 208–15. And *International Harvester Co. of America v. Kentucky*, 234 U.S. 216 (1914), found unconstitutional a law penalizing conduct based on a wholly hypothetical, unascertainable condition. *See id.* at 222–24.

Even if "factual ambiguities" could render a statute vague, Gruver Br. 47, the scenario Plaintiffs describe—where a felon is denied reenfranchisement indefinitely because the facts relating to the payment status of his financial terms of sentence are not known or perhaps even knowable to either himself

[8] The State *does* "dispute the district court's findings that SB7066 renders it impossible for many to determine their eligibility." Gruver Br. 46; *see* Opening Br. 53–55.

or the State—is not possible under the State's advisory opinion process. As already explained, when the State does not have "credible and reliable" information on which to conclude that the felon requesting an opinion has not satisfied his financial terms of sentence, *see* Fla. Stat. § 98.0751(3)(a), it will resolve any such "factual ambiguities" in favor of the felon and acknowledge his eligibility to register and vote.

IV. Florida's Severability Doctrine Did Not Permit the District Court To Rewrite Amendment 4.

Plaintiffs hardly say a word to justify the district court's blue-penciling of Amendment 4. The district court's remedy did not *sever* any provision of Amendment 4, but instead *supplemented* the amendment with a series of provisos. *See* Opening Br. 63. Such judicial legislation runs afoul of "Florida's strong adherence to a strict separation of powers doctrine," *Schmitt v. State*, 590 So. 2d 404, 414 (Fla. 1991), which renders its own courts "without power to rewrite a plainly written statute, even if it is to avoid an unconstitutional result," *Westphal v. City of St. Petersburg*, 194 So. 3d 311, 313–14 (Fla. 2016); *see Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020) (plurality).

Plaintiffs make a passing attempt to shelter the district court's rewrite of Amendment 4 under the amendment's use of the word "completion." But even if "completion" admits of some borderline ambiguities, under no reasonable understanding of the word can a felon be said to "complet[e]" a financial term if he

does nothing to satisfy it. *Cf. Wyche v. State*, 619 So. 2d 231, 236 (Fla. 1993) (prohibiting "narrowing constructions [that] effectively rewrite legislative enactments").

Plaintiffs instead focus largely on insulating the district court's decision from meaningful review by emphasizing the preliminary-injunction panel's prior assertion that severability presents a "mixed question of law and fact" under Florida law. *Jones v. Governor of Florida*, 950 F.3d 795, 832 n.15 (11th Cir. 2020). That conclusion is dubious. A single Florida appellate court adopted that view nearly fifty years ago. *See City Council of City of N. Miami Beach v. Trebor Constr. Corp.*, 254 So. 2d 51, 54 (Fla. Dist. Ct. App. 1971). But there is "persuasive evidence that the [Florida Supreme Court] would rule otherwise" today, *Bravo v. United States*, 577 F.3d 1324, 1326 (11th Cir. 2009), because it has become clear since 1971 that "severability presents a pure question of law," *Seila Law*, 140 S. Ct. at 2208 (plurality); *see also id.* at 2220 (Thomas, J., joined by Gorsuch, J., concurring in part and dissenting in part); Opening Br. 64–65. And even assuming that severability analysis may present subsidiary factual questions, the ultimate question of whether "the good and the bad features are not so inseparable in substance that it can be said that the [People of Florida] would have passed the one without the other," *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1089 (Fla. 1987), is "primarily legal" and thus subject

to de novo review. *See, e.g.*, *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018).

On the issue of likelihood of passage—which is only one of four factors assessed by Florida courts, *see Smith*, 507 So. 2d at 1089—Plaintiffs insist that the district court's substitute Amendment 4 is defensible because: (1) Florida voters did not even know that "all terms of sentence" included financial penalties, *see* Raysor Br. 61–62; and (2) the amendment's primary purpose "was to grant automatic restoration," Gruver Br. 69, and "eliminate permanent disenfranchisement," Raysor Br. 59, and that eviscerating the completion requirement for most felons does not thwart the amendment's "overall" intent. Neither of these contentions is sound.

First, it seems unlikely that *any* competent voter, let alone 60% of the electorate, did not understand (1) that a criminal fine imposed to punish a defendant found guilty of committing a felony is a "term of sentence," and (2) that the word "all" means, well, all. In any event, Plaintiffs' argument that the People of Florida failed to understand the "unambiguous" ordinary meaning of Amendment 4, *Implementation of Amendment 4*, 288 So. 3d at 1078, collides with the settled rule that "voters are generally required to do their homework and educate themselves about the details of a proposal," *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992), and are presumed to have "a certain amount of common understanding and knowledge," *Fla. Educ. Ass'n v. Fla. Dep't of State*, 48 So. 3d 694, 701

(Fla. 2010). Plaintiffs' citations to the record, *see* Raysor Br. 13, merely indicate that a polling expert could not know for certain what Florida voters understood Amendment 4 to mean. Those statements cannot overcome the presumption in Florida law that voters know what they are agreeing to enact.

Second, Plaintiffs' assertion that Amendment 4's primary purpose was to grant automatic reenfranchisement to felons full stop is plainly wrong. As the Florida Supreme Court explained when determining whether Amendment 4 could appear on the ballot, "the chief purpose of the amendment is to automatically restore voting rights to felony offenders, except those convicted of murder or felony sexual offenses, *upon completion of all terms of their sentence*." *Advisory Op. to the Att'y Gen. re: Voting Restoration Amendment*, 215 So. 3d 1202, 1208 (Fla. 2017) (emphasis added). Thus, according to Florida's highest court, the condition that felons complete all terms of sentence was part of Amendment 4's "chief purpose." Allowing *hundreds of thousands* of felons with outstanding financial penalties to evade this condition, *see* A658, would create a reenfranchisement scheme bearing almost no resemblance to the one chosen by the People of Florida.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in the Court's order dated July 6, 2020, because it contains 9,738 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and 11th CIR. R. 32-4. The Court's July 6 order specified that if Plaintiffs were to file collectively an "answer brief" or "response brief" of 16,250 words, the State could file a reply brief of 8,125 words. *See* Order at 2 (July 6, 2020). The order also provided that if the McCoy Plaintiffs filed "an answer brief . . . defending the district court's judgment and injunction," the State could file a reply brief of 9,750 words. *Id.* The McCoy Plaintiffs' joined a brief filed by the Gruver Plaintiffs, which was filed in addition to the Raysor Plaintiffs' brief, as such an answer brief, thus extending the State's reply brief to 9,750 words.

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: August 10, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on August 10, 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 10, 2020

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