

No. 20-12003

In the
United States Court of Appeals
for the Eleventh Circuit

KELVIN 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
Case No. 4:19-cv-00300-RH-MJF**

***EN BANC BRIEF OF AMICI CURIAE THE FINES AND FEES
JUSTICE CENTER, THE CATO INSTITUTE, THE R STREET
INSTITUTE AND THE FLORIDA ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS IN SUPPORT OF PLAINTIFFS-
APPELLEES AND AFFIRMANCE***

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Kelvin Jones, *et al.*

v.

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

In accordance with 11th Cir. R. 26.1-1, the undersigned attorney for *amici curiae* The Fines and Fees Justice Center, The Cato Institute, The R Street Institute and The Florida Association of Criminal Defense Lawyers certifies that the following attorneys, law firm and associations may have an interest in the outcome of this case:

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

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. STATEMENT OF INTERESTS OF <i>AMICI CURIAE</i>	1
II. STATEMENT OF THE ISSUES	3
III. SUMMARY OF ARGUMENT	3
IV. ARGUMENT.....	4
A. Florida Has Been Aggressive in Imposing Fees, Costs, Fines and Other Financial Obligations.	4
B. Florida Is an Outlier in Conditioning Reenfranchisement on Payment of Legal Financial Obligations.....	8
C. The Legal Financial Obligations Imposed on Floridians with Felonies Are Often Insurmountable and Withhold the Franchise Based Solely on Ability To Pay, in Violation of the Equal Protection Clause.....	13
D. Conditioning Reenfranchisement on Payment of Fees and Costs Operates as an Unconstitutional Denial of the Right To Vote for Failure To Pay Taxes.....	28
V. CONCLUSION.....	30

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bailey v. Drexel Furniture Co.</i> , 259 U.S. 20 (1922)	30
<i>Ceithaml v. Celebrity Cruises, Inc.</i> , 739 F. App’x 546 (11th Cir. 2018)	22
<i>Harman v. Forssenius</i> , 380 U.S. 528 (1965)	29
<i>Harper v. Virginia Bd. of Elections</i> , 383 U.S. 663 (1966)	8, 13, 14
<i>Jones v. Gov. of Florida</i> , 950 F.3d 795 (11th Cir. 2020)	14
<i>Malicki v. Doe</i> , 814 So. 2d 347 (Fla. 2002).....	21, 22
<i>Nat’l Fed’n of Indep. Bus. v. Sebelius</i> , 567 U.S. 519 (2012)	30
<i>Romer v. Evans</i> , 517 U.S. 620 (1996)	14
Constitutions, Statutes & Rules	
U.S. Const. amend. XIV	14
U.S. Const. amend. XXIV	8, 28
2003 Ala. Act. No. 2003-415, § 2	9
Ala. Stat. § 15-22-36.1(a)(3).....	9
Ariz. Laws of 2019, Ch. 149, § 7.....	9
Ariz. Stat. § 13-907(A)	10
Ark. Const. Amend. 51, § 11(d)(2)(A)	9
2003 Ark. Act No. 1451, § 1.....	9
Colo. Rev. Stat. § 1-2-103	13
Conn. Stat. § 9-46a(b).....	10
Del. Code tit. 15, §§ 6102(a)(3), 6103.....	12
Fla. Const. art. V, § 14(b)	29
Fla. Stat. § 28.37(2), (3).....	29

	Page(s)
Fla. Stat. § 98.0751(2)(a)	7, 15
Fla. Stat. § 768.096	21
Fla. Stat. § 775.083(1)(c)	6
Fla. Stat. § 893.13(6)(a)	6
Fla. Stat. § 893.135(1)(c)	6
Fla. Stat. § 938.05.	29
Kan. Stat. § 21-6613(b).....	11
La. Stat. § 18:102(A)(1)(b)	13
N.J. Stat. § 19:4-1.....	13
N.M. Stat. § 31-13-1	11
Neb. Rev. Stat. § 29-112	11
Nev. Rev. Stat. § 213.157(1)(b).....	13
Tenn. Stat. § 40-29-202(b)(1), (2)	10
Tex. Code Crim. Proc. § 43.01(a).....	10
Tex. Elec. Code § 11.002(a)(4)(A).....	10
W. Va. Code § 3-2-2(b)	11
Wyo. Stat. § 7-13-105(b)(ii)	11
 Other Authorities	
1984 Ga. Op. Atty. Gen. 71 (May 24, 1984)	11
Adam Looney & Nicholas Turner, The Brookings Inst., <i>Work and Opportunity Before and After Incarceration</i> (March 2018), https://www.brookings.edu/wp- content/uploads/2018/03/es_20180314_looneyincarceration_final. pdf	25

Page(s)

Alicia Bannon, et al., Brennan Ctr. for Justice, <i>Criminal Justice Debt: A Barrier to Reentry</i> (2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf	4
Anastasia Christman & Michelle Natividad Rodriguez, Nat'l Emp. Law Project, <i>Research Supports Fair Chance Policies</i> (2016), https://s27147.pcdn.co/wp-content/uploads/Fair-Chance-Ban-the-Box-Research.pdf	21
Bankrate, <i>Lowest-Income Americans Pay Three Times as Much for Checking Accounts</i> (2017), https://www.bankrate.com/pdfs/pr/20171023-Best-Banks.pdf	26
Civil Rights Clinic, Georgetown Law School, <i>Can't Pay, Can't Vote: A National Survey of the Modern Poll Tax</i> (2019)	10
Council of Economic Advisors, <i>Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor</i> (Dec. 2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf	4
Dallan F. Flake, <i>When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders</i> , 93 Wash. U. L. Rev. 45, 58 (2015)	22
Dick M. Carpenter II, et al., <i>License to Work: A National Study of Burdens from Occupational Licensing</i> (2d ed. 2017), https://ij.org/wp-content/themes/ijorg/images/ltw2/License_to_Work_2nd_Edition.pdf	22
Eli Hager, The Marshall Project, <i>For Men in Prison, Child Support Becomes a Crushing Debt</i> (Oct. 18, 2015), https://www.themarshallproject.org/2015/10/18/for-men-in-prison-child-support-becomes-a-crushing-debt	27
Fines & Fees Justice Center, <i>Florida Driver's License Suspensions</i> (Oct. 7, 2019), https://srln.maps.arcgis.com/apps/MapSeries/index.html?appid=1e772db586154d92998641fb2b901647	24

Page(s)

Fla. Clerks & Comptrollers, *2018 Annual Assessments and Collections Report*, <https://finesandfeesjusticecenter.org/content/uploads/2019/01/2018-Annual-Assessments-and-Collections-Report.pdf>7

Fla. Clerks of Court Operations Corp., *Quarterly Measure and Actions Plans Report* (2016), https://flccoc.org/wp-content/uploads/2018/01/PMAP-Q4-2016-Report_FINAL.pdf.....16

H.R. Staff Analysis, H.B. 13, Reg. Sess. (Fla. 1999)16

Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 Judges J. 4 (2004)27

John Pawasarat & Lois M. Quinn, Emp. & Training Inst., Univ. of Wis. Milwaukee, *The EARN (Early Assessment & Retention Network) Model for Effectively Targeting WIA and TANF Res. to Participants* (2007), <http://www4.uwm.edu/eti/2007/EARNModel.pdf>23

Ky. Exec. Order 2019-003, § 110

Mario Salas & Angela Ciolfi, Legal Aid Justice Ctr., *Driven By Dollars: A State-by-State Analysis of Driver’s License Suspension Laws for Failure to Pay Court Debt* (2017), <https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf>24

N.Y. Exec. Order No. 181, *Restoring the Right to Vote for New Yorkers on Parole* (2018), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Executive_Order_181.pdf12

Nicholas P. Sullivan, *Cell Phones Provide Significant Economic Gains for Low-Income American Households* (2008), https://www.dwt.com/files/Uploads/Documents/Lifeline/2008%20Sullivan_Report.pdf28

Page(s)

Rebekah Diller, Brennan Ctr. for Justice, *The Hidden Costs of Florida’s Criminal Justice Fees* (2010),
https://www.brennancenter.org/sites/default/files/2019-08/Report_The%20Hidden-Costs-Florida%27s-Criminal-Justice-Fees.pdf5, 6, 7, 23

Roberto Roldan, *Florida’s Next Governor Faces Tough Transportation Challenge*, WMFE.org (Aug. 17, 2018),
<https://www.wmfe.org/floridas-next-governor-faces-tough-transportation-challenge/90430>23

Restoration of Rights Project, *State-by-State Comparison: Criminal Record in Employment & Licensing*,
<https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-comparison-of-criminal-records-in-licensing-and-employment/>21

Statement of Governor McAuliffe (June 23, 2015),
<https://www.governor.virginia.gov/newsroom/all-releases/2017/mcauliffe-administration/headline-826609-en.html> 11

Thea Sebastian, et al., *Democracy, If You Can Afford It: How Financial Conditions Are Undermining the Right to Vote*, 1 U.C.L.A. Crim. Just. L. Rev. 79 (2020)5

Trip Gabriel, *Iowa Governor Will Restore Voting Rights to Paroled Felons*, N.Y. Times (June 16, 2020).....11

Tyler Desmond & Charles Sprenger, Federal Reserve Bank of Boston, *Estimating the Cost of Being Unbanked* (2007)26

Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 Ind. L.J. 421 (2018)27

I. STATEMENT OF INTERESTS OF *AMICI CURIAE*

The Fines and Fees Justice Center (“FFJC”) is a non-profit, national center for advocacy, information and collaboration on effective solutions to the unjust and harmful imposition and enforcement of fines and fees in state and local courts. FFJC’s mission is to create a justice system that treats individuals fairly, ensures public safety, and is equitably funded.

The Cato Institute is a non-profit, nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets and limited government. The Cato Institute’s Project on Criminal Justice focuses on the proper role of criminal sanctions in a free society, the scope of substantive criminal liability, the protection of constitutional and statutory safeguards for criminal suspects and defendants, and citizen participation in the criminal justice system.

The R Street Institute is a non-profit, nonpartisan public policy research organization. Its mission is to engage in policy research and educational outreach that promotes properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

The Florida Association of Criminal Defense Lawyers (“FACDL”) is a non-profit organization. FACDL’s mission is to be the unified voice of an inclusive criminal defense community, improve the criminal justice system at the

judicial, legislative and executive levels, and promote the protection of the rights of individuals.

Plaintiffs-Appellees in this case are individuals who were convicted of felonies; who have completed their terms of incarceration, probation and/or parole; and who would be permitted to exercise their fundamental right to vote were it not for their inability to determine the amount of and/or pay fines, fees, costs and other financial obligations (“legal financial obligations” or “LFOs”) assessed in connection with and at the time of their felony criminal convictions. Florida knows most of the plaintiffs will never be able to afford to pay these LFOs, and in many instances the state is unable even to calculate the amount owed, but conditions the fundamental right to vote on their payment. That is unconstitutional. This regime disproportionately affects the most vulnerable members of society by excluding those who cannot afford to pay criminal court debt from participating in the democratic process, while permitting participation by similarly situated persons with greater wealth. For indigent individuals, LFOs perpetuate a cycle of debt and poverty. By conditioning the fundamental right to vote on the payment of LFOs that can never be paid, the legislation at issue—SB7066—acts as a form of continuous punishment for those who have already completed their terms of incarceration, probation and/or parole. *Amici* are

committed to addressing the imposition of fines and fees that unconstitutionally encroach on an individual's fundamental rights, including the right to vote.

II. STATEMENT OF THE ISSUES

Whether the district court correctly held that SB7066's pay-to-vote system violates the Equal Protection Clause as applied to those genuinely unable to pay the required amount.

Whether the district court correctly held that SB7066's pay-to-vote system violates the Twenty-Fourth Amendment with respect to fees and costs.

III. SUMMARY OF ARGUMENT

This appeal presents issues at the core of the fundamental right to vote. By providing the vote to Floridians who can afford to pay LFOs imposed at the time of sentencing, while permanently excluding those who cannot, SB7066 denies the equal protection of law guaranteed by the Constitution. And by conditioning the right to vote on payment of fees and costs used to generate revenue for the government, SB7066 violates the Constitution's prohibition on imposing any tax on the right to vote.

SB7066 must be understood in its proper context—as an extreme measure by a state aggressive in imposing LFOs on criminal defendants. The state's proliferation of LFOs has kept a substantial number of Floridians in poverty, and the collateral consequences of their felony convictions exacerbate

their continued inability to pay their LFOs. By conditioning the right to vote on payment of LFOs imposed at the time of sentencing—while ignoring indigency—Florida is out of step with other states that have rejected categorical, permanent disenfranchisement of indigent individuals convicted of felonies.

IV. ARGUMENT

A. Florida Has Been Aggressive in Imposing Fees, Costs, Fines and Other Financial Obligations.

In recent decades, many states have dramatically increased assessment of LFOs against criminal defendants, whether they are simply charged, prosecuted or actually convicted,¹ and many of those people cannot afford to pay them. The imposition of LFOs reflects the decisions of those states to fund their criminal justice systems, as well as other government services, by exacting payments from individuals charged with crimes rather than by general tax assessments.²

LFOs take different forms and are commonly divided into three categories: *First*, fees and costs “encompass[] a sprawling set of criminal-legal fees, costs, surcharges, and other assessments . . . broadly designed to raise

¹ See Council of Economic Advisors, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor* 1 (Dec. 2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf; Alicia Bannon, et al., Brennan Ctr. for Justice, *Criminal Justice Debt: A Barrier to Reentry* 8 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>.

² Council of Economic Advisors, *supra* note 1, at 2.

money.”³ These may be imposed at sentencing and during supervision.⁴ *Second*, fines “are financial penalties that are intended to punish the criminal defendant.”⁵ *Third*, restitution involves court-ordered payments that are intended to compensate the individual or corporation injured by the crime.⁶ On this appeal, Florida’s only asserted interest in conditioning reenfranchisement on payment of LFOs is punitive, not revenue or restitution. *See En Banc* Opening Br. Defs-Appellants (“Appellants’ En Banc Br.”) 4, 32, No. 20-12003 (11th Cir. July 20, 2020).

Over 10 million people in the United States owe tens of billions of dollars in LFOs.⁷ Florida is an extreme case in the trend of increasing LFOs. From 1996 to 2007, Florida added more than 20 categories of LFOs.⁸ This included, in 1996, creation of a \$40 application fee for public defender representation, raised to \$50 in 2008, and, in 1998, a \$20 surcharge for the Crime

³ Thea Sebastian, et al., *Democracy, If You Can Afford It: How Financial Conditions Are Undermining the Right to Vote*, 1 U.C.L.A. Crim. Just. L. Rev. 79, 83 (2020).

⁴ *Id.*

⁵ *Id.* at 82.

⁶ *Id.*

⁷ Data on file with FFJC.

⁸ Rebekah Diller, Brennan Ctr. for Justice, *The Hidden Costs of Florida’s Criminal Justice Fees* 5 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_The%20Hidden-Costs-Florida%27s-Criminal-Justice-Fees.pdf.

Stoppers Trust Fund.⁹ Since 2008, Florida has required convicted persons to pay the costs of prosecution—a minimum of \$50 for misdemeanors and \$100 for felonies.¹⁰ By the time of sentencing, Floridians with felonies are typically assessed at least \$500 in mandatory fees and costs, though the precise amount varies by county even for the same underlying felony offense.¹¹ This trend is not limited to fees and costs. Statutory fines may also be imposed, which, depending on the underlying charge, can be even more substantial. For example, possession of even a single prescription drug without a prescription is a third-degree felony and punishable by a fine of up to \$5,000.¹² Conviction for trafficking small quantities of oxycodone-based prescription drugs carries a mandatory minimum fine of \$50,000.¹³ According to Plaintiffs’-Appellees’ expert, Dr. Daniel A. Smith, 77.4% of individuals with felony convictions who otherwise would be eligible to

⁹ *Id.* at 5-6.

¹⁰ *Id.* at 6.

¹¹ Vol. 2 Tr. 284:19-285:3 (Carey Haughwout, Public Defender for Palm Beach County, testifying that “[t]he minimum cost for a felony conviction is \$[668] if a person is represented by a court-appointed lawyer and \$548 if represented by a privately retained attorney in Palm Beach County”); *id.* at 286:1-287:8; *id.* at 355:23-25 (Carlos Martinez, Public Defender of Miami-Dade County, testifying that defendants represented by public defenders in his county are assessed, on average, between \$700 and \$800).

¹² Fla. Stat. § 893.13(6)(a); *id.* § 775.083(1)(c).

¹³ *Id.* § 893.135(1)(c).

vote in Florida owe some amount of LFOs.¹⁴ Nearly 60% of those with LFOs owe more than \$1,000.¹⁵

Many individuals convicted of felonies in Florida will incur additional fees after sentencing, such as fees to recoup sentence costs (including room and board while incarcerated), fees for medical care, supervision fees, substance abuse treatment costs and the costs of other conditions of supervision, such as electronic monitoring and urinalysis.¹⁶ These post-sentencing fees are not disqualifying for purposes of reenfranchisement since they are not “contained in the four corners of the sentencing document,”¹⁷ but, as discussed in Section IV.C, they are burdensome and often difficult to disentangle from LFOs assessed at sentencing. The lengthy list of LFOs in Florida resulted in assessments of over \$243 million of that in felony criminal cases.¹⁸ Many of the LFOs are imposed without an assessment of a person’s ability to pay, and judges have no discretion to waive or reduce them.

¹⁴ Vol. 1 Tr. 60:12-19; PX894 ¶¶ 9, 25 & tbl. 3, 31.

¹⁵ *Id.*

¹⁶ Diller, *supra* note 8, at 7.

¹⁷ Fla. Stat. § 98.0751(2)(a).

¹⁸ Fla. Clerks & Comptrollers, *2018 Annual Assessments and Collections Report* 8,10, <https://finesandfeesjusticecenter.org/content/uploads/2019/01/2018-Annual-Assessments-and-Collections-Report.pdf>.

B. Florida Is an Outlier in Conditioning Reenfranchisement on Payment of Legal Financial Obligations.

While several states have increased their use of LFOs in recent decades, SB7066—which requires payment of all LFOs imposed at sentencing *as a condition of reenfranchisement, without consideration of indigency*, following completion of the terms of imprisonment, probation or parole—is unusual. Texas, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, Nebraska and South Carolina (the “Texas Amici”) assert that the district court’s holding “puts States to a Hobson’s choice” such that “[t]hey must choose between re-enfranchising more broadly and re-enfranchising no one,” *En Banc Br. States Tex., Ark., Ga., Ky., La., Miss., Neb., & S.C. Amici Curiae* (“Texas Amici Br.”) 1, No. 20-12003 (11th Cir. July 20, 2020), but this misrepresents both SB7066 and the practice of other states.

Conditioning the right to vote upon LFO payment is a recent practice, which has no basis in tradition and has not been endorsed by the U.S. Supreme Court. At one time, 11 Southern states had poll taxes. Although Florida abolished its poll tax in 1937, five states retained a poll tax as of 1964, when the Twenty-Fourth Amendment was ratified, forbidding the imposition in federal elections of “any poll tax or other tax.” U.S. Const. amend. XXIV, § 1. Two years later, the Supreme Court held that the Equal Protection Clause forbids states from making the “payment of any fee an electoral standard” for state elections. *Harper v.*

Virginia Bd. of Elections, 383 U.S. 663, 666 (1966). At that time, no state conditioned the right to vote on payment of LFOs.¹⁹

The Texas Amici assert that seven states other than Florida “expressly condition re-enfranchisement” on payment of LFOs: Alabama, Arizona, Arkansas, Connecticut, Kentucky, Tennessee and Texas. Texas Amici Br. at 3-4. However, only two of these states, Alabama and Arkansas, have laws like Florida’s that explicitly require the payment of *all* LFOs imposed at sentencing as a condition of reenfranchisement, with no exception for indigency.²⁰ Alabama and Arkansas enacted their laws conditioning reenfranchisement on payment of LFOs in 2003.²¹ The remaining five states are dissimilar and, in fact, have recently trended toward *eliminating* the payment of LFOs as an absolute condition of reenfranchisement.

Last year, Arizona repealed its requirement for the payment of “fines” as a condition of reenfranchisement,²² and now requires only the payment of

¹⁹ *See infra* note 20 and accompanying text.

²⁰ *See* 2003 Ala. Act. No. 2003-415, § 2 (codified at Ala. Stat. § 15-22-36.1(a)(3)) (requiring payment of “all fines, court costs, fees, and victim restitution ordered by the sentencing court at the time of sentencing”); 2003 Ark. Act No. 1451, § 1 (codified at Ark. Const. Amend. 51, § 11(d)(2)(A)) (requiring payment of “all applicable court costs, fines, or restitution” as well as “all probation or parole fees”).

²¹ *See id.*

²² *See* Ariz. Laws of 2019, Ch. 149, § 7.

“victim restitution.”²³ Connecticut repealed its requirement for the payment of “fines” for in-state convictions as a condition for restoration of voting rights in 2001,²⁴ retaining the requirement only for out-of-state or federal convictions.²⁵ In Kentucky, the governor issued an executive order in 2019 providing that payment of “restitution, fines, and any other court-ordered monetary conditions” is not required for reenfranchisement.²⁶ And Tennessee expressly takes indigency into account for reenfranchisement purposes, and restores voting rights for those unable to pay all of their LFOs.²⁷ The law in Texas is unclear, and there is no publicly available guidance on whether payment of LFOs is required for restoration of voting rights.²⁸ None of these states expressly disenfranchises indigent individuals convicted of felonies in the manner Florida does.

²³ Ariz. Stat. § 13-907(A).

²⁴ See Conn. Stat. § 9-46a(b).

²⁵ See *id.* § 9-46a(a).

²⁶ Ky. Exec. Order 2019-003, § 1.

²⁷ See Tenn. Stat. § 40-29-202(b)(1), (2) (court costs need not be paid for reenfranchisement if an individual is found to be indigent at the time of application for a voter registration card).

²⁸ Civil Rights Clinic, Georgetown Law School, *Can't Pay, Can't Vote: A National Survey of the Modern Poll Tax* 49 (2019). There is no precedent for applying the law on discharging a sentence for fines and costs, Tex. Code Crim. Proc. § 43.01(a), to the definition of a “qualified voter,” which makes no reference to LFOs, Tex. Elec. Code § 11.002(a)(4)(A).

The eight other states identified by the Texas Amici as having laws with “broad language . . . that *might* be applied to require payment of” LFOs before reenfranchisement, Texas Amici Br. at 4 (emphasis added), also differ significantly from Florida. The trend among these states, too, has been toward fewer LFO-based conditions on reenfranchisement. As of 2015, in Virginia, “outstanding court costs and fees will no longer prohibit an individual from having his or her rights restored”;²⁹ and in Iowa, the governor recently announced that she would soon issue an executive order reinstating the voting rights of Iowans who have completed their felony prison sentences.³⁰ In Georgia, eligibility for reenfranchisement is conditioned on payment only of certain fines, rather than all LFOs imposed at sentencing.³¹ While the other five states “use broad language,” none of those states in fact expressly requires payment of all LFOs imposed at

²⁹ Statement of Governor McAuliffe (June 23, 2015), <https://www.governor.virginia.gov/newsroom/all-releases/2017/mcauliffe-administration/headline-826609-en.html>.

³⁰ Trip Gabriel, *Iowa Governor Will Restore Voting Rights to Paroled Felons*, N.Y. Times (June 16, 2020), <https://www.nytimes.com/2020/06/16/us/politics/iowa-felons-voting-rights.html>.

³¹ 1984 Ga. Op. Atty. Gen. 71 (May 24, 1984) (opining that the payment of any “fine” “authorized by statute in addition to and independent of any sentence of probation” is required for restoration of voting rights).

sentencing following completion of the terms of imprisonment, probation or parole as a condition of reenfranchisement—as Florida does.³²

Some states do require completion of supervision before reenfranchisement, and payment of LFOs may be a condition of supervision or a means to obtain early release. While these practices are troubling in that they may extend the term of supervision for indigent individuals convicted of felonies up to the maximum term permitted under the law, they do not (as Florida does) bar people who complete their terms of probation or parole from voting. Moreover, these statutes may be discretionary in their application, permitting the sorts of case-by-case indigency determinations that Florida law does not.

Florida's pay-to-vote scheme is also inconsistent with recent nationwide trends in favor of reenfranchisement of individuals convicted of felonies. In 2016, Delaware eliminated an LFO payment requirement and reenfranchised individuals at the completion of supervision.³³ In 2018, New York's governor issued an executive order stating that all individuals on parole for a felony conviction are eligible for a conditional pardon.³⁴ 2019 saw four states

³² Kan. Stat. § 21-6613(b); Neb. Rev. Stat. § 29-112; N.M. Stat. § 31-13-1; W. Va. Code § 3-2-2(b); Wyo. Stat. § 7-13-105(b)(ii).

³³ Del. Code tit. 15, §§ 6102(a)(3), 6103.

³⁴ N.Y. Exec. Order No. 181, *Restoring the Right to Vote for New Yorkers on Parole* (2018),

reenfranchise individuals convicted of felonies: Louisiana permits individuals convicted of felonies who have not been incarcerated during the last five years to vote regardless of supervision status, and Colorado, Nevada and New Jersey reenfranchise individuals upon release from incarceration.³⁵

Consequently, SB7066 is unrepresentative of the practice of most other states.

C. The Legal Financial Obligations Imposed on Floridians with Felonies Are Often Insurmountable and Withhold the Franchise Based Solely on Ability To Pay, in Violation of the Equal Protection Clause.

The district court correctly concluded that SB7066 conditions the fundamental right to vote on the payment of disqualifying LFOs that can never be paid, thus impermissibly encroaching on the fundamental right to vote and violating the Equal Protection Clause of the Fourteenth Amendment. *See* A1104; *see also Harper*, 383 U.S. at 668 (“To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.”). In doing so, SB7066 conditions democratic participation on wealth without any significant, much less rational, purpose. And, by restricting the right

https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Executive_Order_181.pdf.

³⁵ La. Stat. § 18:102(A)(1)(b); Colo. Rev. Stat. § 1-2-103; Nev. Rev. Stat. § 213.157(1)(b); N.J. Stat. § 19:4-1.

to vote on the basis of LFO payment status, SB7066 ensures that the collateral consequences of felony convictions operate as an additional and continuing punishment for individuals unable to pay back disqualifying LFOs.

1. SB7066 Violates the Equal Protection Clause Regardless of the Level of Scrutiny Applied.

The Equal Protection Clause restricts disparate treatment of similarly situated individuals. U.S. Const. amend. XIV. Equal protection “must coexist with the practical necessity that most legislation classifies for one purpose or another,” and consequently the standard of scrutiny for disparate treatment varies depending on the extent to which a law classifies similarly situated individuals in certain *suspect* ways. *See Romer v. Evans*, 517 U.S. 620, 631 (1996). If a law’s classifications are not suspect, rational basis review applies, and the law will be upheld so long as it is rationally related to a legitimate governmental interest. *Jones v. Gov. of Florida*, 950 F.3d 795, 809 (11th Cir. 2020). But where a law conditions access to the franchise on the basis of wealth—a classification “not germane to one’s ability to participate intelligently in the electoral process”—such a scheme constitutes “invidious discrimination” and “must be closely scrutinized and carefully confined.” *Harper*, 383 U.S. at 668, 670 (“[W]ealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.”). Because SB7066 “restrict[s] access to the franchise” based on an individual’s ability to pay, not her ability to

participate in the democratic process, it requires exacting judicial review. *Jones*, 950 F.3d at 808. Accordingly, the district court properly concluded that heightened scrutiny applies and SB7066 fails to withstand heightened scrutiny.

Even applying rational basis review, however, there is no *rational* reason to condition the fundamental right to vote on the payment of disqualifying LFOs that can never be paid. *First*, Defendants'-Appellants' assertion that there is some rational relationship between Florida's legislative scheme and a legitimate government interest because "it would not have been irrational for the Legislature to assume that the 54.2% of felons owing *less than \$1,000* would eventually be able to repay that debt" is not only belied by the record in this case, but also inconsistent with the law's plain language.³⁶ Defendants-Appellants have manufactured for litigation a hypothetical, *post hoc* distinction between LFOs greater than \$1,000 and LFOs less than \$1,000, even though SB7066 does not make that distinction. Instead, the law applies generally: it conditions the fundamental right to vote on the payment of disqualifying LFOs for all Floridians with felonies—the 22.6% who owe no LFOs at all, the 31.6% who owe less than \$1,000, and the 45.8% who owe more than \$1,000.³⁷ Even if the Florida legislature could rationally assume individuals owing less than \$1,000 would be

³⁶ Appellants' En Banc Br. 40 (July 20, 2020) (emphasis added).

³⁷ *Id.*; see also Fla. Stat. § 98.0751(2)(a).

able to repay their LFOs—and it could not—SB7066 nevertheless fails rational basis review because it does not actually make the distinction on which Defendants-Appellants seek to rely.

Second, even if it were appropriate to evaluate the constitutionality of SB7066 by examining individuals owing less than \$1,000 in isolation, it would have been *irrational* for the Florida legislature to assume most individuals with disqualifying LFOs under \$1,000 are able to pay their debts. To the contrary, the legislature has previously concluded that “most criminal defendants are indigent” and, as a result, the state has “minimal collections expectations” for approximately two-thirds of individuals who are either indigent or who have had their LFOs converted into a civil judgment or lien.³⁸ Put differently, the same legislature that chose to condition the fundamental right to vote on the payment of *all* LFOs imposed at the time of sentencing is also aware that the vast majority of individuals who must pay these LFOs are genuinely indigent, rendering collection futile. Conditioning the fundamental right to vote on the payment of debts that can never

³⁸ H.R. Staff Analysis, H.B. 13, Reg. Sess. (Fla. 1999); PX894 ¶ 37 (citing Fla. Clerks & Comptrollers, *supra* note 18); Vol. 1 Tr. 82:9-15. Additionally, the performance standard for collections by the circuit criminal courts set by the Florida Clerks of Court Operations Corporation is a collection rate of only 9%. Fla. Clerks of Court Operations Corp., *Quarterly Measure and Actions Plans Report* (2016), https://flccoc.org/wp-content/uploads/2018/01/PMAP-Q4-2016-Report_FINAL.pdf.

be paid—while allowing other, wealthier Floridians with felonies to vote—is irrational and violates the Equal Protection Clause under any level of scrutiny.

2. The Majority of Disqualifying LFOs Can Never Be Paid Because of the Serious Collateral Consequences of Felony Convictions.

In 2010, Plaintiff Raquel Wright was convicted of a non-violent drug offense and received a three-year mandatory minimum sentence.³⁹ Before conviction, Wright was a public school teacher.⁴⁰ Following her incarceration, Wright struggled to find employment: she routinely failed background checks and was denied employment at 7-11, Walmart and Target.⁴¹ Eventually, Wright was hired as a part-time legal research assistant where she earns approximately \$450 per month—an average of \$22 per workday.⁴² This is not enough to cover “basic needs and necessities” for Wright and her daughter—including school tuition, car insurance and student loan payments—let alone the \$54,000 in LFOs she owes as a result of her single non-violent drug offense.⁴³

³⁹ Preliminary Injunction Tr. 144:25-145:2.

⁴⁰ *Id.* at 143:13.

⁴¹ *Id.* at 145:12-18.

⁴² *Id.* at 143:16-144:13.

⁴³ *Id.* at 144:16-21.

Likewise, Plaintiff Rosemary McCoy—a Navy veteran—spent a year-and-a-half searching for employment after her term of incarceration and even participated in a reentry program specifically designed to help formerly incarcerated individuals secure employment.⁴⁴ McCoy has found some seasonal work, such as working at Jacksonville Jaguars games, but this sporadic work does not provide McCoy with sufficient funds to pay down her LFOs of nearly \$7,000.⁴⁵

Wright and McCoy exemplify how LFOs exacerbate the collateral consequences of conviction and entrench individuals in a cycle of debt, foreclosing access to the ballot box solely on account of personal financial means, not the criminal conviction. These collateral consequences—including difficulties finding and securing employment, affordable housing and phone, internet and banking access—impose significant obstacles that make it challenging, and often impossible, to make any LFO payments at all. Indeed, to successfully pay off disqualifying LFOs, an individual must (i) ascertain *only* the LFOs assessed “in the four corners” of her sentencing document, (ii) determine whether she will be able to make payments *only* toward disqualifying LFOs, not various post-sentencing fines and fees, and (iii) find and secure employment with wages sufficient to allow her to support herself and her family and pay her disqualifying LFOs *and* any

⁴⁴ *Id.* at 136:2-19.

⁴⁵ *Id.* at 135:4-136:1.

additional court debt or other debt she may have incurred. Taken together, this web of debts entangles individuals in a cycle of continuous punishment far broader than the four corners of their sentencing document.

a. *Ascertaining the Amount of Disqualifying LFOs and Paying Only Those Amounts Is Virtually Impossible.*

Ascertaining—and ultimately paying—the amount of disqualifying LFOs is often an insurmountable task. That is because LFOs “assessed at sentencing” are not typically pronounced at sentencing or tracked as standalone debts after sentencing.⁴⁶ Plaintiffs’-Appellees’ expert Dr. Burch concluded, and the district court found, that state agencies cannot provide consistent and reliable information about the size and status of LFOs.⁴⁷ When the state agencies charged

⁴⁶ Vol. 2 Tr. 313:10-17 (the sentencing court may make “a referral to sort of standard court costs . . . without there being a number associated with it”); *see also id.* at 359:15-19; A1048 (“One cannot know, from the information in this record, whether any financial obligation was included in the ‘four corners’ of Mr. Gruver’s criminal judgment.”).

⁴⁷ PX892 at 7; A1078 & n.86 (“A group of well-trained, highly-educated individuals . . . found . . . that, remarkably, there were inconsistencies in the available information for all but 3 of the 153 individuals.”); A1086 (“An extraordinarily competent and diligent financial manager in the office of the Hillsborough County Clerk of Court, with the assistance of several long-serving assistants” with “combined experience of over 100 years . . . were unable to explain discrepancies in the records.”). Notably, Defendants-Appellants do not challenge these findings. Defendants-Appellants do not explain how, in light of Dr. Burch’s conclusions, someone owing less than \$1,000 in disqualifying LFOs might be able to ascertain and pay back *only* those LFOs.

with collecting LFOs cannot disentangle disqualifying LFOs from non-disqualifying LFOs it becomes “impossible” “to pay towards only the amounts originally assessed in the four corners of the sentencing document”—the only debt that matters with respect to reenfranchisement.⁴⁸

Moreover, even if an individual is able to ascertain the amount of disqualifying LFOs, she may be prohibited from making payments to satisfy *only* that debt. Many counties in Florida have “policies preventing partial payments and policies that require the payment of interest, collection agency fees, convenience fees, or other debt *imposed after sentencing*.”⁴⁹ Ultimately, the process of ascertaining actual amounts owed *only* in disqualifying LFOs becomes “expensive, time consuming, and ultimately, discouraging for people who want to vote.”⁵⁰

b. *Individuals with Felony Convictions Struggle To Find Employment To Pay Off Their Debt.*

Even in cases where individuals can ascertain how much they owe in disqualifying LFOs and can make payments only toward that debt, they struggle to find gainful employment to pay off that debt. The obstacles that Floridians with

⁴⁸ PX892 at 11.

⁴⁹ *Id.* (emphasis added).

⁵⁰ *Id.*; *see also* Preliminary Injunction Tr. 153:6-17.

felonies face in finding and securing employment are numerous, significant and discouraging.

First, Florida does not ban private employers from inquiring about criminal history on job applications.⁵¹ These “check-the-box” questions inevitably result in employment discrimination based on criminal history. In a nationwide study, prospective employers contacted 34% of white individuals without a criminal record but only 17% of white individuals with a criminal record.⁵² Among Black individuals, these statistics plummet: prospective employers contacted 14% of Black individuals without a criminal record but only 5% of Black individuals with a criminal record.⁵³ When an individual, and in particular a person of color, “checks the box,” disqualification from employment is all but certain.

Second, employers are incentivized to run criminal background checks on potential hires because Florida recognizes a negligent hiring cause of

⁵¹ Restoration of Rights Project, *State-by-State Comparison: Criminal Record in Employment & Licensing*, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-comparison-of-criminal-records-in-licensing-and-employment/>.

⁵² Anastasia Christman & Michelle Natividad Rodriguez, Nat’l Emp. Law Project, *Research Supports Fair Chance Policies* 3 (2016), <https://s27147.pcdn.co/wp-content/uploads/Fair-Chance-Ban-the-Box-Research.pdf> (citing Devah Pager, *The Mark of Criminal Record*, 108 Am. J. Soc. 937 (2003)).

⁵³ *Id.*

action.⁵⁴ If an employer conducts a background check and *does not* uncover information indicating the applicant is “unfit” for employment, the employer enjoys a presumption that it was not negligent.⁵⁵ This presumption encourages employers to conduct criminal background checks and disqualify individuals with felony convictions as “unfit” for employment to avoid potential civil tort liability in the future.

Third, there are over 70 occupations in Florida—including speech pathologist, embalmer, pest-control technician, cosmetologist, land surveyor and septic tank contractor—requiring some kind of license impacted by one’s criminal history.⁵⁶ Almost 55% of lower-income occupations in Florida require a license, which may be impacted by criminal history.⁵⁷ This is more than any other state in the region, and the fifth-highest in the country.⁵⁸ These restrictive licensing requirements, on top of Florida’s hiring practices, rules and regulations, make it

⁵⁴ *Malicki v. Doe*, 814 So. 2d 347, 361-62 (Fla. 2002); Fla. Stat. § 768.096.

⁵⁵ *Malicki*, 814 So. 2d at 362; *see also Ceithaml v. Celebrity Cruises, Inc.*, 739 F. App’x 546, 552 (11th Cir. 2018).

⁵⁶ Dallon F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 Wash. U. L. Rev. 45, 58 (2015); Dick M. Carpenter II, et al., *License to Work: A National Study of Burdens from Occupational Licensing* 62-63 (2d ed. 2017), https://ij.org/wp-content/themes/ijorg/images/lw2/License_to_Work_2nd_Edition.pdf.

⁵⁷ Carpenter, *supra* note 56, at 21.

⁵⁸ *Id.* at 62.

significantly more difficult for Floridians with felonies to find and secure employment, earn the money they need to pay back their disqualifying LFOs, and regain access to the democratic process.

c. *Even After Finding Employment, Individuals with LFOs Struggle To Keep Their Jobs and Earn Enough To Pay Off LFOs.*

Even in cases where an individual knows how much she owes in disqualifying LFOs, is able to make payments only toward those LFOs, and can find gainful employment, she must maintain that employment and earn enough to pay off her LFOs. *First*, notwithstanding the fact that it is impractical to find and keep employment in Florida without a driver's license, driver's license suspensions are one of the most common penalties in Florida for failure to pay LFOs.⁵⁹ Florida strips away access to transportation from those who need it most. A 2007 study concluded that a valid driver's license is a more accurate predictor of sustained employment than a General Education Development (GED) diploma among recipients of public assistance.⁶⁰ Even worse, Florida's license-for-payment

⁵⁹ Diller, *supra* note 8; Roberto Roldan, *Florida's Next Governor Faces Tough Transportation Challenge*, WMFE.org (Aug. 17, 2018), <https://www.wmfe.org/floridas-next-governor-faces-tough-transportation-challenge/90430> (“[T]he American Society of Civil Engineers calls Florida's transportation system ‘mediocre,’ noting that only 2 percent of Floridians commute using public transportation.”).

⁶⁰ John Pawasarat & Lois M. Quinn, Emp. & Training Inst., Univ. of Wis. Milwaukee, *The EARN (Early Assessment & Retention Network) Model for*

scheme is uniquely taxing for indigent individuals: Florida is (i) one of only 14 states to apply a license-for-payment scheme to criminal justice debts *unrelated to* traffic convictions;⁶¹ and (ii) one of only five states to employ indefinite mandatory license suspensions for criminal justice debts unrelated to traffic convictions *without* accounting for indigency.⁶² This framework places individuals with outstanding LFOs in a catch-22: *already* unable to pay their LFOs, individuals face losing their driver's license and then cannot secure the employment they desperately need to resume payments and continue working toward reenfranchisement.

Second, even if an individual is able to find *and* keep gainful employment, the work she is most likely to find is low-paying, making it difficult to pay off LFOs, let alone afford the basic costs of living. Plaintiff Wright is a

Effectively Targeting WIA and TANF Res. to Participants, (2007), <http://www4.uwm.edu/eti/2007/EARNModel.pdf>.

⁶¹ In Miami-Dade County only 2,232 driver's license suspension notices were issued for dangerous driving or public safety issues in 2017. That same year, 250,063 suspension notices were issued for unpaid fines and fees in traffic and criminal cases. Fines & Fees Justice Center, *Florida Driver's License Suspensions* (Oct. 7, 2019), <https://srln.maps.arcgis.com/apps/MapSeries/index.html?appid=1e772db586154d92998641fb2b901647>.

⁶² Mario Salas & Angela Ciolfi, Legal Aid Justice Ctr., *Driven By Dollars: A State-by-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt*, 1 (2017), <https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf>.

perfect example. She earns \$450 *per month* or \$5,400 *per year* but has over \$54,000 in LFOs resulting from a single nonviolent drug charge.⁶³ Plaintiffs' - Appellees' expert Dr. Walker concluded that just 55% of formerly incarcerated individuals in Florida released in 2012 reported *any income at all* in the first year after their release and those who did averaged less than \$11,000.⁶⁴ A 2018 nationwide study similarly concluded that of formerly incarcerated individuals who receive some type of pay, median annual income is \$10,090 in the first full year after release and \$13,601 in the third full year after release.⁶⁵

d. *LFOs Are Not the Only Financial Stressors Impacting Individuals With Felony Convictions.*

LFOs are just some of the many debts an individual with a felony conviction may face. Because individuals with felony convictions have likely incurred additional debts on top of their LFOs, disqualifying LFOs are even more difficult to pay off. This means it is more likely that individuals with felony convictions become entrenched in a cycle of debt that functionally prevents them

⁶³ *Supra* Section IV.C.2.a.

⁶⁴ PX896 at 8.

⁶⁵ Adam Looney & Nicholas Turner, The Brookings Inst., *Work and Opportunity Before and After Incarceration* 10 (March 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf.

from paying off LFOs and thus permanently excludes them from the democratic process based solely on their finances.

The Cost of Being Unbanked. Americans with a checking account and annual household income under \$30,000 pay three times as much in bank fees as those in higher income brackets.⁶⁶ As a result, many individuals earning less than \$30,000 annually—which includes many previously incarcerated Floridians—are unbanked and incur fees for check cashing, bill payment and other basic bank services. Check cashing outlets charge as much as 10% of a check’s face value in fees.⁶⁷ This means that if Plaintiff Wright tries to cash her \$450 monthly check at her local check cashing provider, she may incur a fee of up to \$45 just to do so. Moreover, the unbanked often have difficulty building credit history, which may impact loan decisions, employment decisions and housing decisions, further prolonging the cycle of debt.⁶⁸

Affordable Housing. Felony convictions typically bar individuals from applying for public housing, and leasing companies run background checks

⁶⁶ Bankrate, *Lowest-Income Americans Pay Three Times as Much for Checking Accounts* (2017), <https://www.bankrate.com/pdfs/pr/20171023-Best-Banks.pdf>.

⁶⁷ Tyler Desmond & Charles Sprenger, Federal Reserve Bank of Boston, *Estimating the Cost of Being Unbanked* (2007).

⁶⁸ *Id.*

that may result in exclusion of individuals with felony convictions.⁶⁹ This trend persists even though “denying housing to those with criminal records has the predictable, but absurd effect of increasing rates of recidivism and harming public safety.”⁷⁰

Child and Family Support Obligations. Florida does not toll child support payments during incarceration.⁷¹ Incarcerated individuals, many of whom are parents, leave prison with substantial, accumulated child support debt. If these individuals are ultimately able to secure employment, they face having up to 65% of any earnings garnished, significantly hampering their ability to satisfy other debts.⁷²

Phone and Internet. Cellular phones and internet access allow individuals to find, apply for and receive jobs. Individuals in lower-income

⁶⁹ Vol. 2 Tr. 353:19-354:6 (testimony about the practices of leasing companies for private apartment buildings in Miami-Dade County).

⁷⁰ Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 Ind. L.J. 421, 432 (2018).

⁷¹ Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 Judges J. 4, 6 (2004).

⁷² Eli Hager, The Marshall Project, *For Men in Prison, Child Support Becomes a Crushing Debt* (Oct. 18, 2015), <https://www.themarshallproject.org/2015/10/18/for-men-in-prison-child-support-becomes-a-crushing-debt>.

brackets disproportionately depend on cell phones to earn money.⁷³ Accordingly, purchasing a cell phone, securing internet access and paying monthly phone and internet bills are costs indigent individuals must shoulder to access economic opportunities that will allow them to pay existing debt.

These collateral consequences demonstrate just some of the most significant obstacles that Floridians with felonies must overcome before they can even begin making payments toward their LFOs to restore their fundamental right to vote. LFOs exacerbate the collateral consequences of conviction, making it highly unlikely that individuals with felony convictions will be able to pay their disqualifying LFOs, regardless of the amount. The Florida legislature has recognized as much. There can be no rational reason to condition the fundamental right to vote on the payment of LFOs that never can and never will be paid.

D. Conditioning Reenfranchisement on Payment of Fees and Costs Operates as an Unconstitutional Denial of the Right To Vote for Failure To Pay Taxes.

The district court also properly concluded that SB7066 violates the Twenty-Fourth Amendment, which prohibits “den[ying] or abridg[ing]” the right to vote “by reason of failure to pay any poll tax or other tax.” U.S. Const. amend. XXIV. The prohibition includes poll taxes as well as their “equivalent or milder

⁷³ Nicholas P. Sullivan, *Cell Phones Provide Significant Economic Gains for Low-Income American Households* 5 (2008), https://www.dwt.com/files/Uploads/Documents/Lifeline/2008%20Sullivan_Report.pdf.

substitute[s]” that have the “disenfranchising characteristics of the poll tax.” *See Harman v. Forssenius*, 380 U.S. 528, 539, 542 (1965) (explaining that the Twenty-Fourth Amendment was motivated in part by “the . . . objection[] to the poll tax . . . that it exacted a price for the privilege of exercising the franchise”).

Florida uses the revenue from fee and cost assessments to finance government programs. Since 1998, clerks’ offices for county and circuit courts have been funded in full by court fees and filing costs.⁷⁴ Any amounts collected by the clerk in excess of the clerk’s budget, after transferring amounts directed to explicitly designated programs, must be deposited into the Clerks of the Court Trust Fund maintained by the Department of Revenue.⁷⁵ Much of this money is then transferred to the General Revenue Fund.⁷⁶ This is in addition to amounts transferred to the General Revenue Fund on a mandatory basis. For example, \$25 of the \$225 court cost imposed on every person who is found guilty of a felony or who pleads guilty or *nolo contendere* to a felony is remitted to the General Revenue Fund.⁷⁷

⁷⁴ Fla. Const. art. V, § 14(b).

⁷⁵ Fla. Stat. § 28.37(2), (3).

⁷⁶ *Id.* § 28.37(3)(b)(1)-(4).

⁷⁷ *Id.* § 938.05.

Fees and costs in Florida are unquestionably “taxes” under the functional approach used to determine what constitutes a tax. *See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564-66 (2012). “[T]he essential feature of any tax” is that [i]t produces at least some revenue for the Government.” *Id.* at 564. Whether it functions as a tax or as punishment “may be immaterial” “[w]here the sovereign enacting the law has power to impose both tax and penalty,” *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922), as Florida has done. The fees and costs Florida imposes are intended to produce revenue for the state. They fund the criminal justice system and general government programs, *see* Section IV.A, and the district court rightly concluded that, when used to restrict the right to vote, they are unconstitutional taxes under the Twenty-Fourth Amendment.

V. CONCLUSION

For the foregoing reasons, we respectfully request that this Court affirm the District Court’s Order.

Signed this 3rd day of August, 2020.

Respectfully submitted,

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COMBINED CERTIFICATIONS

The undersigned hereby certifies the following:

1. Independent Authorship. No counsel for any party in this case authored this brief in whole or in part, and no party, party's counsel or any other person, contributed money that was intended to fund preparing or submitting this brief.
2. Type-Volume Limitations. This brief complies with the type-volume limitation set forth in Fed. R. App. P. 29(a)(5). As measured by the word-processing system used to prepare this brief, this brief contains 6,426 words.
3. Typeface and Type-Style Requirements. 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)(5)-(6). It was prepared using a 14-point, proportionally spaced typeface with serifs and set in a roman style, except as otherwise permitted.
4. Filing. In accordance with Fed. R. App. P. 25(a)(2)(B)(ii) and 11th Cir. R. 31-3, on August 3, 2020, this brief was electronically filed with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. In accordance with 11th Cir. R. 35-7, twenty copies of the foregoing brief were dispatched to the Clerk of the Court via third-party commercial carrier for delivery on August 4, 2020.

5. Service. Service was accomplished on all counsel of record by the appellate CM/ECF system.

Signed this 3rd day of August, 2020.

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