IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

KELVIN LEON JONES et al.,

Plaintiffs,

v.

CONSOLIDATED
CASE NO. 4:19cv300-RH/MJF

RON DeSANTIS et al.,

Defendants.

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ORDER DENYING THE MOTION TO DISMISS OR ABSTAIN AND GRANTING A PRELIMINARY INJUNCTION

These consolidated cases arise from a voter-initiated amendment to the Florida Constitution that automatically restores the right of most felons to vote, but only The Florida Supreme Court means not only terms of imprisonment and supervision but also fines, restitution, and other financial obligations imposed as part of a sentence. The Florida Legislature has enacted a statute that says the phrase *does* include these financial obligations.

The principal issue in these federal cases is whether the United States Constitution prohibits a state from requiring payment of financial obligations as a

condition of restoring

obligations; the other two have alleged, but not sworn, that they are unable to pay.[1] The organizational plaintiffs are the Florida State Conference of the NAACP, the Orange County Branch of the NAACP, and the League of Women Voters of Florida. They have associational standing to represent individuals whose eligibility to vote is affected by Amendment 4 and SB7066.

The plaintiffs assert that conditioning the restoration of right to vote on the payment of financial obligations violates the United States Constitution, both generally and in any event when the felon is unable to pay. The plaintiffs

Protection and Due Process Clauses, and the Twenty-Fourth Amendment, which says the right to vote in a federal election cannot be denied by reason of failure to

The plaintiffs also allege that

implementation of this system for restoring the right to vote has been so flawed

The defendants, all in their official capacities, are the Secretary of State and Governor of Florida, the Supervisors of Elections of the counties where all but two of the individual plaintiffs reside, and the Supervisor of Elections of Orange County, where no individual plaintiff resides but one of the organizational plaintiffs is based. The counties where an individual plaintiff resides but the Supervisor is not a defendant are Broward and Pinellas.

The officials who are primarily responsible

election system and registering voters are the Secretary at the state level and the Supervisors of Elections at the county level. They are proper defendants in an action of this kind. *See Ex parte Young*, 209 U.S. 123 (1908).

The Secretary and Governor are the defendants who speak for the state in this litigation. They have consistently taken the same positions. For convenience, and because the Secretary, not the Governor, has primary responsibility for elections and voting, this order usually refers to the Secretary as shorthand for both of these defendants, without also mentioning the Governor.

The Secretary has moved to dismiss or abstain. The plaintiffs have moved for a preliminary injunction. The motions have been fully briefed and orally argued. The record consists of live testimony given at an evidentiary hearing as well as deposition testimony, declarations, and a substantial number of exhibits.

II. Background: Felon Disenfranchisement, Amendment 4, and SB7066

Florida has disenfranchised felons going back to at least 1845. Its authority to do so is beyond question. In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court read an apportionment provision in section 2 of the Fourteenth Amendment as authority for states to disenfranchise felons.

e section 2 apportionment provision leads to this result. *Harvey v. Brewer*, 605 F.3d 1067, 107

SB7066 includes a variety of provisions. Two are the most important for purposes of this litig0QqrtJETQq0.00000912 0 612 792 reW* nQq0n reW* nBT/F1 14.04 Tf1 0

doubt. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) (holding that the Eleventh Amendment bars any claim for injunctive relief based on state law against a state or against a state officer); *but see Harvey*, 605 F.3d at 1080-81 (resolving state-law felon-disenfranchisement issues on the merits). In any event, any resolution of this issue in these consolidated federal cases would be short-lived; the Florida Supreme Court, whose view on this will be controlling, has oral argument on this very issue scheduled just three weeks hence. *See* ECF No. 148-14 at 2.

The Secretary says the proper manner of dealing with this uncertainty in these federal cases is to abstain. The Secretary first invokes *Railroad Commission of Texas v. Pullman Co.*, 3a040 G[(v.)4(P)4(u)4(l)-3(l)-3(m)13(a)-3(n)-3( )11(Co)-3(.)] TJETB

The first of the two

The Secretary says these decisions apply only in voting-rights cases and do not apply here because the plaintiffs are felons who have no right to vote that this case involves only *restoration* of the right to vote, not an already-existing right to vote. But voting is no less important to these plaintiffs than to others, and a ruling on the constitutional rights is no less urgent than it would be for individuals who have never been convicted. Moreover, the proposed distinction assumes she is right on the merits that, as she contends on the merits, the plaintiffs still have no right to vote. A court does not properly decide to abstain by first .

The second circumstance that makes abstention inappropriate here is that the ruling on the most important part of the unclear issue of state law can be predicted with substantial confidence. This is addressed in the next section of this order.

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In sum,

or not to include, fines and restitution. This brings us to considerations beyond just the amendmen language.

Under Florida law, a voter-initiated constitutional amendment may go on the ballot only if its language and its ballot summary are approved in advance by the Florida Supreme Court. *See* Fla. Const. art. IV § 10; *see id.* art. X, § 3(b)(10).

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The intended meaning of Amendment 4 cannot be determined based only on what the proponent said at oral argument or what three justices thought at that time. A critical question even more important is what a reasonable *voter* would have understood the amendment language to mean. But the Florida Supreme Court has said that in construing amendments,

relevant. *Zingale*, 885 So. 2d at 282-83; *see also Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960). The court will surely take into account the assertions at oral argument. The proponents of an amendment ought not be able to tell the Florida Supreme Court that the amendment means one thing but later, after adoption, assert the amendment means something else.

In any event, voters might well have understood the amendment to require felons to meet all components of their sentence whatever they might be before automatically becoming eligible to vote. The plaintiffs say the

restore the right of felons to vote and that all doubts should be resolved accordingly that is, in favor of otherwise-disenfranchised felons. But that goes too far. The theory of most voters might well have been that felons should be allowed to vote only when their punishment was complete when they paid their

If, based on this theory, a felon must serve a prison sentence or finish a term of supervision as a condition of voting, it is difficult to argue that a felon who is

able to pay a fine should not be required to do so, also as a condition of voting. Fines are imposed as punishment, sometimes instead of, sometimes in addition to, imprisonment. Inability to pay raises different issues, not only of policy but of constitutional law, but those are issues bearing only a little, if at all, on the proper interpretation it

no reason to know how it was calculated no reason to believe the estimate included felons with unpaid financial obligations. More important than the estimated number of affected felons was the assertion, readily derived from the text of the amendment, that felons would become eligible only after completing terms of sentence. The estimated raw number says little if anything about what the voters understood this language to mean.

Indeed, the estimate does not even show what those who came up with the estimate or embraced it understood the amendment to mean. The analysts may have -justice system and may have failed even to spot the issue. Those who embraced the estimate likely had no idea how many felons would be affected by a requirement to pay fines and restitution, let alone by a requirement to pay other financial obligations. The plaintiffs have tendered no evidence that anyone who made or embraced the estimate actually considered this issue, knew that a substantial number of Florida sentences include fines and restitution, knew that *all* Florida sentences include other financial obligations, or knew that most felons who have finished their time in prison and under supervision have not paid all these financial obligations. The erroneous estimate of the effect of the amendment, even if widely accepted, does not show that most voters thought the right to vote would be restored to those whose sentences included unpaid fines or restitution.

The fees include $50 for applying for representation by a public defender;[8] $100 for actual representation by a public defender;[9] at least $100 for the state costs (though these are not court costs of the kind ordinarily taxed in favor of a prevailing party in litigation);[10] $225 again unrelated to court costs of the traditional kind), of which $25 is remitted to the Department of Revenue for deposit in the General Revenue Fund; and 14.04 Tf1 0 0 1 429.0

vote on the payment of fees for representation by a public defender. And the same could be said of some if not all of the other fees.

At the very least, the analysis of whether Amendment 4 conditions restoration of the right to vote on the payment of

law, were still denied the right to vote. The Supreme Court rejected their claim that this, without more, violated the Equal Protection Clause.

Even so, the Court did *not* say that because a state could choose to deny all felons the right to vote and to restore none of them, decision to restore the vote to some felons but not others was beyond the reach of the Constitution. Quite the contrary. The Court remanded the case to the California Supreme Court California had not treated all felons uniformly and that the disparate treatment violated the Equal Protection Clause. *Id.* at 56. The remand was appropriate because when a state allows some felons to vote but not others, the disparate treatment must survive review under the Equal Protection Clause. The same is true here.

Similarly, in *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc), the court all felons, subject to restoration of the right to vote by the Florida Executive Clemency Board. Again, though, the court did *not* restore the vote to some felons but not others was beyond constitutional review. Instead, citing an equal-protection case, the court made clear that even in restoring the right of felons to vote, a state must comply with other constitutional provisions. *See id.*, 405 F.3d at 1216-17 n.1 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966)).

An earlier decision to the same effect is *Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978). T power to disenfranchise felons does not allow the state to restore voting rights only to whites or otherwise to completely arbitrary distinction between groups of felons with respect to the right to vote. *Id*. at 1114. As a decision of the Old Fifth Circuit, *Shepherd* remains binding in the Eleventh. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc).

Other courts, too, have recognized that provisions restoring the voting rights of felons are subject to constitutional review. *See, e.g., Harvey v. Brewer*, 605 F.3d 1067, 1079

VIII. The Constitution Allows a State to Condition Reenfranchisement on Payment of At Least Some Financial Obligations

Leaving aside for the moment claims based on inability to pay or the Twenty-Fourth Amendment, it is clear that a state can deny restoration of right to vote based on failure to pay financial obligations included in a sentence. This is so regardless of the level of scrutiny deemed applicable whether rational-basis scrutiny, as the Secretary contends, or strict scrutiny tempered by the holding in *Richardson* that the Fourteenth Amendment affirmatively allows felon disenfranchisement.

Harvey applied rational-basis scrutiny and upheld the Arizona requirement to pay fines and restitution. No plaintiff claimed indigency, so the court did not address that issue or the level of scrutiny it would trigger. *See Harvey*, 605 F.3d at 1080.) *Johnson v. Bredesen* applied rational-basis scrutiny and upheld a requirement to pay restitution and unrelated child-support obligations, even as applied to felons unable to pay. *Madison v. State*, 163 P.3d 757 (Wash. 2007), with no majority opinion, upheld a requirement to pay fines, costs, and restitution, even as applied to felons unable to pay.

As an original matter, one might take issue with this treatment of right to vote -

today we would add women are endowed with unalienable rights, including life, liberty, and the pursuit of happiness. The Declaration says that to secure these

First, the State of Florida

solely because the felon does not have the financial resources necessary to pay restitution. And because, for this purpose, there is no reason to treat restitution differently from other financial obligations included in a sentence, Florida also cannot deny solely because the felon does not have the financial resources to pay the other financial obligations. The court summed it up succinctly: *Access to the franchise cannot be made to depend on an individualôs financial resources*. *Johnson*, 405 F.3d at 1216-17 n.1 (emphasis added).

Second, the State meets its constitutional obligation that is, its obligation

unwavering principle: the law of the circuit as established in the first case to address an issue must be followed until altered by the Eleventh Circuit en banc or the United States Supreme Court. *See, e.g.*, *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. Sept. 13, 2019); *United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008). District judges in the circuit must follow course. That an issue is resolved in a footnote rather than in the text of an opinion makes no difference.

To be sure, dictum a statement unnecessary to the decision in a case is not

As a binding Eleventh Circuit holding, the *Johnson* footnote would be controlling even in the absence of Supreme Court decisions supporting the result. But *Johnson* does not lack Supreme Court support; it is consistent with a series of Supreme Court decisions.

In one, *M.L.B. v. S.L.J.*

-protection claims based on indigency are subject to only rational-basis review. This is the same general rule on which the Secretary places heavy reliance here. But in *M.L.B.* the Court said there are two exceptions to the general rule. *Id*. at 123-24.

The first exception, squarely applicable here, is for claims related to voting. *Id* The basic right to participate in political processes as voters and candidates cannot be limitCq792 reW*3(e ba)pate in p6gThe basic rigThe baotect

resolution.

with a net worth of $100,000 or more but not for other felons. Would anyone contend this was constitutional? One hopes not. An official who adopts a constitutional theory that would approve such a statute needs a new constitutional theory.

The difference between the hypothetical, on the one hand, and Amendment 4 and SB7066, on the other hand, is that the financial condition in the hypothetical is

These out-of-circuit decisions do not carry the day for the Secretary. The *Harvey* plaintiffs did not allege inability to pay, so the court explicitly declined to address the issue. *Johnson v. Bredesen* was a 2 1 decision, and the dissent had the better of it. *Madison* was again a split decision, and again the dissent had the better of it. More importantly, a district court in the Eleventh Circuit cannot decline to follow a binding circuit precedent just because other courts have taken a different view. *Johnson* is controlling.

X. Johnson v. Governor: The Scope of the Remedy

542 (holding it unconstitutional to require indigent voters to file certificates of residency not required of voters who paid a $1.50 poll tax).

The flaw in the contention is this. As set out above, the State can condition ent of fines and restitution the felon is able to pay. When a felon claims inability to pay, the State need not just take the inability to pay on the felon and, to that end, may put in place an appropriate administrative process. That this places a greater burden on the felon claiming inability to pay than on felons with no unpaid obligations is unavoidable and not improper.

The process available to the *Johnson* plaintiffs was an application to the Executive Clemency Board. The individual plaintiffs in the case at bar also have the right to apply to the Executive Clemency Board. If the Board operates at a pace that makes it an available remedy in fact, the State can satisfy its *Johnson* obligation through the Board, so long as the Board complies with *Johnson*. This will mean restoring the right to vote of any felon who applies and whose right to vote would be automatically restored under Amendment 4 and SB7066 but for financial obligations the applicant is genuinely unable to pay.

The Executive Clemency Board is not, however, the forum in which other felons will claim their right to vote under Amendment 4 and SB7066. Just as the

State could satisfy its obligation to the indigent *Johnson* plaintiffs by making available to them the same process available to others, so also the State may satisfy its obligation to the indigent plaintiffs in the case at bar by making available to them the same process available to others whose right to vote has been restored under Amendment 4 and SB7066. That process consists of up to six steps.

First, a felon, like any other prospective voter, submits an

qualified voters.[17] Sixth, the applicant may challenge the decision through an action in state circuit court, where evidence may be presented and the decision will be made de novo, without deference to the Supervisor.[18]

Consistently with *Johnson*, the State could meet its obligation not to deny restoration of the right to vote based on lack of financial resources by requiring the Secretary to determine at step three of the process, or by allowing an otherwise-qualified felon to establish at step four, that the reason for failing to pay any outstanding financial obligation was inability to pay. That this might require a hearing does not make it unconstitutional. *See Johnson*, 405 F.3d at 1217 n.1 (The requirement of a hearing is insufficient to support the plaintiffs claim.). Or the State could meet its obligation by a constitutionally acceptable alternative method. What the State cannot do, under *Johnson*, is deny the right to vote to a felon who would be allowed to vote but for the failure to pay amounts the felon has been genuinely unable to pay.

XI. The Community-Service Option Does Not Save an Unconstitutional Requirement to Pay

SB7066 includes a provision allowing a court to convert a financial obligation to commu

option does not eliminate the disparate treatment of otherwise-qualified felons based on financial resources. Those with financial resources would still be able to vote simply by paying their financial obligations, while felons without the same resources would not be able to do so. The option thus does not cure the underlying problem: *Access to the franchise cannot be made to depend on an individualôs financial resources*. *Johnson*, 405 F.3d at 1216-17 n.1 (emphasis added).

XII. Twenty-Fourth Amendment

The Twenty-Fourth Amendment to the United States Constitution provides

> shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

right to vote at all, but that makes no sense. A law allowing felons to vote in federal elections but only upon payment of a $10 poll tax would obviously violate the Twenty-Fourth Amendment.

Florida has not, of course, explicitly imposed a poll tax. The financial obligations at issue were imposed as part of a criminal sentence. The obligations existed separate and apart from, and for reasons unrelated to, voting. Every court that has considered the issue has concluded that such a preexisting obligation is not a poll tax. *See, e.g.*, *Johnson v. Bredesen*, 624 F.3d 742, 751 (6th Cir. 2010); *Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010); *Thompson v. Alabama*,

293 F. Supp. 3d 1313, 1332-33 (M.D. Ala. 2017); *Coronado v. Napolitano*, No. cv-07-1089-PHX-SMM, 2008 WL 191987 at *4-5 (D. Ariz. Jan. 22, 2008).

This does not, however, end the Twenty-Fourth Amendment analysis. The amendment applies not just to any poll tax but also to any other tax. As the Secretary

same principle applies to the Twenty- any

. . .

There is no defensible

imposed at the time of voting or only any tax imposed explicitly for the purpose of

prohibiting citizens from voting while in arrears on their federal income taxes or state sales or use taxes would plainly violate the Twenty-Fourth Amendment. A state could not require a voter to affirm, on the voter-registration application or when casting a ballot, that the voter was cu The very idea is repugnant.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976), and *J.R. v. Hansen*, 736 F.3d 959, 966 (11th Cir. 2015). For factual disputes, a hearing is often required, and this opinion assumes that in Florida a felon has a constitutional right to a hearing on any factual dispute about whether the felon has completed all terms of sentence as required.

Under current Florida procedure, a felon who asserts eligibility to vote is entitled to a hearing before the Supervisor of Elections. A felon dissatisfied with a de novo proceeding in state circuit court, complete with full due process. This is constitutionally sufficient so long as all material factual disputes are in play at the hearing. The Due Process Clause does not preclude the State from placing the burden of going forward at the hearing, and even the burden of proof, on the felon. That carrying the burden will be difficult

to s. 4, Art. VI of the State Constitution upon the completion of all terms of my

Fla. Stat. § 97.052(2)(t) (2019).

During closing arguments in this case, the Secretary called these required attestations , and they surely are.[23] But they are worse than that; as the Secretary acknowledged, there are eligible individuals who could not attest to any of the three new statements. The statements do not reach felons whose rights have been restored in other states or through other methods, including executive pardons. *See, e.g., Schlenther v. Depât of State, Div. of Licensing*, 743 So. 2d 536, 537 (Fla. 2d DCA 1998) (restores the civil rights of one of its citizens whose rights had been lost because of a conviction in that state, they are restored and the State of Florida has no authority to suspend or restore them at that point.). If Florida adopts an application form that tracks the statute and does nothing more as did the initial draft prepared in response to SB7066[24] the form will not only discourage eligible felons from voting but will make it impossible for some eligible felons even to apply. The Secretary says that as of now, the Supervisors of Elections in all 67 Florida counties are accepting the old form.[25]

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[23] -50.

[24] ECF No. 148-3 at 4.

[25] ECF No. 205 at 51.

In addition, if Florida wishes to address inability to pay through its existing six-step administrative process, *see supra* at 37-38, rather than in a functioning Executive Clemency Board or federal court, the state may wish to provide a method by which a felon can claim inability to pay on the application form.

SB7066 created a workgroup tasked with addressing these and other difficulties.[26] The workgroup may design a system improving accessibility to records, may improve the application form, and may suggest other changes. Before this case goes to trial, the Florida Legislature will meet again and may choose to address the substantial administrative and constitutional issues not resolved by SB7066. The Florida Constitution does not preclude the Legislature from restoring the right to vote beyond the minimum required by Amendment 4 an approach that could minimize, if not eliminate, the administrative and constitutional issues.

In any event, these individual plaintiffs have not yet shown a likelihood of success on the merits of the claim that they, as distinct from other affected felons, will suffer a denial of due process in the absence of an injunction broader than set out in this order. Nor have the organizational plaintiffs made this showing for any individual whose rights they assert.

[26] *See* ECF No. 148-46 at 33-35; *see also* ECF No. 152-116.

pay.

4. The Secretary of State must not take any action that both (a) prevents an individual plaintiff from voting and (b) is based only on failure to pay a financial obligation that the plaintiff shows the plaintiff is genuinely unable to pay. The plaintiffs to which this paragraph applies are the same as for paragraph 3 above.

5. This injunction does not prevent the Secretary from notifying the appropriate Supervisor of Elections that a plaintiff has an unpaid financial obligation that will make the plaintiff ineligible to vote unless the plaintiff shows that the plaintiff is genuinely unable to pay the financial obligation.

6. The defendant Supervisor of Elections of the county where an individual plaintiff is domiciled must not take any action that both (a) prevents the plaintiff from applying or registering to vote and (b) is based only on failure to pay a financial obligation that the plaintiff asserts the plaintiff is genuinely unable to pay. The Supervisors and individual plaintiffs to which this paragraph applies are the Supervisor of Alachua County for the plaintiffs Jeff Gruver and Kristopher Wrench; the Supervisor of Sarasota County for the plaintiff Betty Riddle; the Supervisor of Miami-Dade for the Plaintiff Karen Leitch; the Supervisor of Duval County for the plaintiffs Keith Ivey, Rosemary McCoy, and Sheila Singleton; the Supervisor of Indian River County for the plaintiff Raquel Wright; the Supervisor of Manatee County for the plaintiff Stephen Phalen; the Supervisor of Leon County for the plaintiff Jermaine Miller; and the Supervisor of Hillsborough