No. 19-14551

IN THE UNITED STATES

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Bonnie Raysor, Diane Sherrill, and Lee Hoffman (collectively, "*Raysor* Plaintiffs") state that they are natural persons, and therefore have no parent corporations, nor have they issued shares or debt securities to the public.

I hereby certify that the disclosure of interested parties submitted by Defendants-Appellants Governor of Florida and Secretary of State of Florida is complete and correct except for the following corrected or additional interested persons or entities:

1. Nelson, Janai S. - *Attorney for Gruver Plaintiffs/Appellees*
2. Spital, Samuel - *Attorney for Gruver Plaintiffs/Appellees*

/s/ *Danielle M. Lang*
Counsel for Raysor *Plaintiffs-Appellees*

STATEMENT REGARDING ORAL ARGUMENT

This Court has scheduled oral argument to take place on January 28, 2020. Appellees Raysor, Sherrill, and Hoffman agree that oral argument would aid the Court in adjudicating the State's appeal, which seeks to undermine the bedrock constitutional principle that the right to vote cannot be denied on the basis of wealth.

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JURISDICTIONAL STATEMENT

Raysor Appellees[1] agree with Appellants' jurisdictional statement as it applies to Secretary of State Lee. For the reasons stated in *Raysor* Appellees' jurisdictional brief, *Gruver*, *Raysor*, and *Jones* Plaintiffs-Appellees' Jurisdictional Br. ("Jurisdictional Br."), Governor DeSantis has not been harmed by the District Court's preliminary injunction and does not have standing to bring this appeal. Furthermore, because the district court

STATEMENT OF THE CASE

"[A]ccess to the franchise cannot be made to depend on an individual's financial resources." *Id.* But for the district court's injunction, Plaintiffs would be unable to vote because of their inability to pay outstanding legal financial obligations. This Court need only decide whether the Constitution tolerates such wealth discrimination in voting. Both binding Eleventh Circuit and decades of Supreme Court precedent hold it does not.

I. Statement of Facts

On November 6, 2018, Florida voters approved, by a nearly two-to-one margin, a constitutional amendment ("Amendment 4") that re-enfranchised people with felony convictions "upon completion of all terms of sentence including parole or probation."[2] Fla. Const. art. VI § 4; Doc. 207 at 6.

Before Amendment 4, Florida's felony disenfranchisement law was among the harshest in the nation. Doc. 152 at 27 (Br. of Sentencing Project as Amicus Curiae, *Hand v. Scott*, No. 18-11388, 2018 WL 332853 at *5 (11th Cir. Jun. 28, 2018) ("Sentencing Project Br.")). Florida alone accounted for over one-quarter of all U.S. citizens disenfranchised due to criminal history. *Id.* at *14-16. Over 1.6

[2] Those convicted of murder or felony sexual offenses do not qualify for automatic rights restoration and must receive clemency to restore their voting rights. Fla. Const. art. VI, § 4. That exclusion is not at issue. When this brief refers to people with felony convictions, it excludes those with disqualifying convictions.

million Floridians, nearly 1.5 million of whom had completed all terms of incarceration and supervision, were excluded. *Id.* at *15. More than ten percent of Florida's voting age population, and more than twenty percent of Florida's Black voting age population, were permanently disenfranchised under this scheme. *Id.* at *14-16. In 2018, Floridians overwhelmingly voted to restore their fellow citizens' voting rights.

Last May, the Florida Legislature enacted Senate Bill 7066 ("SB-7066"). 2019-162 Fla. Laws. For purposes of voting rights restoration, SB-7066 defined "completion of all terms of sentence including probation and parole" to include "full payment of restitution" and "full payment of fines or fees ordered by the court as part of the sentence or . . . as a condition of any form of supervision."[3] *Id.* at 28 (codified at Fla. Stat. § 98.0751(2)(a)(5)).

Conversion of LFOs to civil liens "is a longstanding Florida procedure that courts often use for obligations a criminal defendant cannot afford to pay" that "takes the obligation out of the criminal justice system." Doc 207 at 7, 12. In FY 2017-2018, over half of LFOs imposed by Florida Circuit Criminal Courts were converted

[3] The precise parameters of the challenged SB-7066 provisions remain unclear—even to Secretary Lee. *See* Doc. 152-94 ¶ 23 (noting the Secretary's office was "still working to determine "what [LFOs] are part of the sentence and the current status of those [LFOs]"); Doc. 152-85 at 142:6-13; 151:3-4 (deposition of Bureau of Voter Registration Services Chief) ("I am still unclear as to what fines and fees have to be completed.").

SB-7066 appears to add nothing to the pre-existing and rarely utilized mechanism for conversion to community service. Of the over $214 million in fines and other monetary penalties imposed by Circuit Criminal Courts last fiscal year, fewer than one million were converted to community service. Doc. 152 at 28 (Clerks Report at 10). *None* of the over $46 million in fees, service charges, and costs assessed against criminal defendants were converted to community service. *Id.* Moreover, individuals performing court-ordered community service receive credit at the federal minimum hourly wage of $7.25. Fla. Stat. § 318.18(8)(b)(1)-(2). At that rate, most people seeking to complete their LFOs through community service "would miss many votes before they could satisfy their financial obligations in this way, even if allowed to do so, and some plaintiffs would never be able to satisfy their obligations." Doc. 207 at 39.

Governor DeSantis signed SB-7066 on June 28, 2019, stating his belief that Florida voters' approval of Amendment 4 was a "mistake." Doc. 152 at 26.

Impact of SB-7066's LFO Requirements

Most Floridians with convictions exit the criminal justice system saddled with debt. Florida funds its court system largely with revenue collected from fines, fees, surcharges, and costs imposed on criminal defendants. *See* Fla. Const. art. V, § 14; Doc. 207 at 42. The mandatory fees and costs imposed on criminal defendants—regardless of ability to pay—are at least $548 for every defendant and at least $698

for those with court-appointed lawyers. Doc. 207 at 42-43. In addition, many criminal defendants face steep mandatory fines for their offenses, also imposed regardless of inability to pay, up to $750,000 and no lower than $25,000 for drug trafficking convictions. *See, e.g.*, Fla. Stat. § 893.13(1)(c)(3); Fla. Stat. § 893.135. Restitution, likewise, is imposed without determining the defendants' ability to pay. *See Noel v. State*, 191 So.3d 370, 375 (Fla. 2016).

Many returning citizens simply cannot afford to pay their LFOs, nor does Florida anticipate payment. In 2018, the Circuit Criminal Courts reported a collection rate of only 20.55% and categorized 85.79% of LFOs as "at risk"—meaning there are "minimal collections exp

Implementation of SB-7066

SB-7066 went into effect on July 1, 2019. 2019-162 Fla. Laws. However, Florida still lacks processes to implement SB-7066's LFO requirements, largely because no one—not potential voters, nor supervisors of elections, nor clerks, nor the Secretary of State—has access to reliable data on outstanding LFOs.[4] Doc. 207 at 43 (Florida's LFO records are "decentralized, often accessible only with great difficulty, sometimes inconsistent, and sometimes missing altogether."); Doc. 239 at 23:17-22. Thus, as of October 8, Secretary Lee did not have access to reliable information on disqualifying LFOs and therefore was not identifying individuals with outstanding LFOs for removal from the rolls. Doc. 152-93 at 174:5-11; Doc. 152-103, at 1; Doc. 152-85 at 67:17-18, 123:7-9. At a December 3 hearing, Defendants' counsel indicated that the Secretary would begin identifying individuals with outstanding LFOs for removal. Doc. 239 at 25:19-26:1. *Raysor* Plaintiffs are unaware what, if anything, has changed such that the Secretary now has access to the requisite "credible and reliable evidence" to identify such individuals.

[4] The Restoration of Voting Rights Work Group—created by SB-7066—issued extensive recommendations to the Legislature regarding the overhaul of record-keeping and access to records necessary to implement SB-7066's LFO requirements. Doc. 240-1 at 19, 22, 24. These recommendations, which have not been implemented, confirm that the status quo leaves both voters and election officials in the dark in determining eligibility for people with past convictions. Further, it appears *no* governmental entity tracks outstanding restitution. Doc. 167-76 at 3 ("Restitution is a big problem"); Doc. 153-3, 86:25-87:17 (deposition of court clerk).

II. Proceedings Below

This appeal involves five consolidated cases. *See* Defendants-Appellants' Brief ("Defs. Br.") at 10. The *Raysor* Plaintiffs brought the following claims: (1) SB-7066's LFO requirements, absent an ability to pay inquiry, constitute wealth disenfranchisement in violation of the Fourteenth Amendment; (2) SB-7066's LFO requirements impose poll taxes in violation of the Twenty-Fourth Amendment; (3) portions of SB-7066's LFO requirements, as applied, are unconstitutionally vague; (4) the Secretary's implementation of SB-7066's LFO requirements violates procedural due process; and (5) SB-7066's voter registration provisions violate the National Voter Registration Act. Related Case No. 4:19-cv-301, Doc. 12 ¶ 106-158. Only the first claim is at issue in this appeal.

After a two-day evidentiary hearing, the district court denied Secretary Lee's motion to dismiss or abstain and granted Plaintiffs' motion for a preliminary injunction in part. Doc. 207. Secretary Lee's motion relied on her assertion that Amendment 4 independently requires payment of LFOs and Governor DeSantis's request to the Florida Supreme Court for an advisory opinion on the meaning of Amendment 4.[5] Doc. 97. For purposes of deciding the preliminary injunction, the

[5] The Florida Supreme Court heard oral argument on November 6 but has not yet

district court assumed Amendment 4's meaning mirrors SB-7066 and concluded that interpretation would not change the ruling. Doc. 207 at 23.

On the merits, the district court acknowledged a state's right under *Richardson v. Ramirez*, 418 U.S. 24 (1974), to disenfranchise people with felony convictions and the "considerable leeway" a state has in shaping its rights restoration procedures. Doc. 207 at 28. Indeed, the court went so far as to conclude that a state can constitutionally "decide that the right to vote should not be restored to a felon who is able to pay but chooses not to do so."[6] *Id.*

Yet, the district court also recognized that rights restoration is not a constitution-free zone. *Id.* at 29-35. Following a binding and controlling *en banc* decision of this Court in the context of voting rights restoration for people with convictions, the district court concluded the command in that case governs: "Access to the franchise cannot be made to depend on an individual's financial resources." *Id.* at 29; *Johnson*, 405 F.3d at 1216-17 n.1 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966)). In *Johnson*, this Court held that the challenged rights restoration process was constitutional "*because* Florida [did] not deny access to the restoration of the franchise based on ability to pay." 405 F.3d at 1216-17 n. 1 (emphasis added).

[6] This ruling was limited to the Fourteenth Amendment claim and does not extend to the Twenty-Fourth Amendment analysis. Doc. 207 at 27.

Because SB-7066 *does* deny access to the restoration of the franchise based on ability to pay, the district court concluded that its LFO requirements are unconstitutional as applied to those genuinely unable to pay. Doc. 207 at 30. The district court explained that its ruling—and *Johnson*'s—are consistent with a line of Supreme Court wealth-discrimination cases holding that political participation "cannot be limited to those who can pay for a license" and "punishment cannot be increased because of a defendant's inability to pay." *Id.* at 32-33 (citing *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) and *Bearden v. Georgia*, 461 U.S. 660 (1983)).

The district court ordered a limited remedy, ruling that *Johnson* requires only that the State adopt "an appropriate procedure through which the plaintiffs can attempt to establish genuine inability to pay," and that if an otherwise eligible voter establishes an inability to pay, they must be permitted to vote. *Id.* at 50-51. The court, in the first instance, left the particulars of that process to the Secretary's discretion.

The wealth-discrimination claim is the only claim upon which the district court granted relief. *Id.* at 53-54. With respect to the Twenty-Fourth Amendment, the court explained that the merits would turn on whether the various LFOs constitute taxes. *Id.* at 41. But while the court opined on which LFO may constitute taxes—noting that "it is far from clear" that costs and fees are "not tax[es]"—the court declined to rule on this claim. *Id.* at 42-43. With respect to Plaintiffs' procedural due process and vagueness claims, the district court noted that they had

"considerable force" given the disarray of Florida's criminal records. *Id.* at 43. Nonetheless, the court declined to grant a preliminary injunction on these grounds, relying largely on the assumption that the Secretary would not require potential voters to risk criminal prosecution to determine their eligibility. *Id.* at 44-50.

Immediately after the district court's order, the Governor issued a statement *agreeing* with the decision and "recognizing the need to provide an avenue for individuals unable to pay back their debts as a result of true financial hardship." Doc. 244 at 5. Despite initially suggesting she would do so, Secretary Lee has taken no affirmative actions to implement the district court's limited ruling. Doc. 239 at 33:2-34:17. Nearly a month after the district court ruled, Secretary Lee filed a notice of appeal. Doc. 219.

On November 27, Secretary Lee moved the district court for a stay pending appeal and on December 6 sought an expedited schedule from this Court. On December 19, the district court stayed the preliminary injunction in part. Doc. 244 at 2. The district court did not stay the provisions of the preliminary injunction allowing those who assert an inability to pay to register to vote, but did stay the provisions allowing plaintiffs to cast a ballot. *Id.* That stay dissolves on February 11, 2020. *Id.*

III. Standard of Review

The standard for a preliminary injunctio

SUMMARY OF ARGUMENT

The district court did not abuse its discretion by preliminarily enjoining SB-7066's LFO requirements as applied to otherwise eligible voters who are genuinely unable to pay their outstanding LFOs.

The result below is compelled by binding *en banc* Eleventh Circuit precedent holding, in the context of voting rights restoration, that "[a]ccess to the franchise cannot be made to depend on an individual's financial resources." *Johnson,* 405 F.3d at 1216 n.1.

A long line of Supreme Court precedent establishes that states cannot constitutionally deny the right to vote because of impecunity or impose additional

factual findings not yet developed or made by the district court. Doc. 207 at 41. If this Court nonetheless reaches the merits, LFOs share the essential characteristics of taxes, namely, the production of "at least some revenue for the Government." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564 (2012). Thus, the Twenty-Fourth Amendment's prohibition on denying or abridging the right to vote because of failure to pay any tax bars SB-7066's LFO requirements.

Finally, the district court ordered a proper limited injunction. Secretary Lee's gambit arguing that the district court's as-applied ruling dooms Amendment 4 as a whole fails. Decades of precedent demonstrate that as-applied cases do not implicate a severability analysis. Moreover, Secretary Lee has conceded that Amendment 4—even if it includes LFOs—does not necessarily require *payment* of LFOs but rather could be satisfied by another statutory mechanism. Finally, any *sub silentio* LFO requirement lurking within Amendment 4 is severable. All of the other preliminary injunction factors weigh heavily in Plaintiffs' favor since a contrary result would deny Plaintiffs the right to vote.

This Court should affirm the district court's proper application of longstanding Supreme Court and Eleventh Circuit binding precedent ensuring that the right to vote, preservative of all other rights, is not doled out based on who can pay.

ARGUMENT

I. The State Cannot Condition the Right to Vote on Ability to Pay.

A. *Johnson*'s Holding that Access to the Right to Vote Cannot Be Conditioned on Wealth Controls this Case.

The district court's preliminary injunction rests on controlling precedent from this Court sitting *en banc*: "Access to the franchise cannot be made to depend on an individual's financial resources." *Johnson*, 405 F.3d at 1216 n.1. As the district court noted, the relevant portion of *Johnson* addressed the precise issue on appeal—wealth-discrimination in access to voting—in this precise context—rights restoration. Doc. 207 at 29.

Prior to Amendment 4, the only mechanis

of whether an individual had outstandi

On appeal, Secretary Lee argues for the first time[8] that *Johnson* does not control because of the final sentence in the footnote: "[W]e say nothing about whether conditioning an application for clemency on paying restitution would be an invalid poll tax." *Johnson*, 405 F.3d at 1216 n.1. Based on this caveat, Secretary Lee now argues that *Johnson* "expressly with[held] judgment on the issue in question." Defs. Br. at 20. This argument is meritless.

The *Johnson* caveat has nothing to do with the constitutional question at issue: whether the right to vote can be withheld on the basis of inability to pay LFOs. That issue *was* addressed by the *Johnson* court. The *Johnson* court merely withheld judgment as to whether a requirement to pay restitution for a clemency application would be an unconstitutional poll tax.

As the district court explained in its recent order on the stay motion:

> A poll tax, of course, is unconstitutional regardless of ability to pay. Whether a person can be required to pay a sum as a condition of voting, regardless of ability to pay, is a different issue from whether a person can be denied the right to vote for failing to pay an otherwise-proper exaction that the person is genuinely unable to pay. . . . When it issued *Johnson*, the Eleventh Circuit surely understood the difference between

[8] Remarkably, despite Plaintiffs' reliance on *Johnson* below, Secretary Lee made no arguments regarding *Johnson* below. *See* Doc. 244 at 7 ("Having made no effort to come to grips with *Johnson* in advance, the Governor's and Secretary's newfound criticism of the October 18 order rings hollow.").

Thus, Secretary Lee's post-hoc attempt to dismiss *Johnson* cannot be credited at this late stage. *See Hurley v. Moore*, 233 F.3d 1295, 1297 (11th Cir. 2000) ("Arguments raised for the first time on appeal are not properly before this Court."); *FDIC v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir. 1993).

the Fourteenth and Twenty-Fourth Amendments and between a poll-tax claim and an inability-to-pay claim.

condition a right as important as the franchise on ability to pay, even it can otherwise lawfully restrict it on other grounds.

In *Griffin v. Illinois*, the Supreme Court held that that the Equal Protection and Due Process Clauses prohibit the denial of trial transcripts to indigent defendants who cannot pay the requisite transcript fees. 351 U.S. 12, 18 (1956). Even though "a State is not required by the Federal Constitution to provide . . . a right to appellate review at all," if it does provide such review, it cannot do so "in a way that discriminates against some convicted defendants on account of their poverty." *Id*. Likewise, once the state decides to restore voting rights to people with convictions, in cannot do so "in a way that discriminates against some convicted defendants on account of their poverty." *See id.*

Following *Griffin*, the Court invalidated many other instances of wealth discrimination. *See, e.g.*, *Williams v. Illinois*, 399 U.S. 235 (1970) (prolonged incarceration due to involuntary nonpayment); *Tate*, 401 U.S. 395 (conversion of fine to incarceration for defendants unable to pay); *Mayer v. City of Chicago*, 404 U.S. 189 (1971) (denial of appellate transcripts to those unable to pay even where defendant faced only a fine); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (denial of divorce proceeding to those unable to pay fees and costs); *Zablocki*, 434 U.S. 374 (denial of marriage certificate to people not current on child support obligations); *Bearden*, 461 U.S. 660 (revocation of probation for failure to pay absent

determination of ability to pay); *M.L.B.*, 519 U.S. 102 (denial of appeal of termination of parental rights to those who cannot pay record costs).

The Supreme Court has synthesized this line of cases on more than one occasion and each formulation of this body of law confirms the proper application of the wealth-discrimination doctrine by the district court.

1. *The* M.L.B. *Exceptions*

a. The Right to Vote Can Never Hinge on Ability to Pay.

Most recently, the Court explained that there are at least two exceptions to the general rule that fee requirements are subject to rational basis review. Doc. 207 at 32 (citing *M.L.B.*, 519 U.S. at 123-24). The first exception presages *Johnson* and applies here: "The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license." *Id.* The landmark case establishing this principle is *Harper*, which not only held poll taxes unconstitutional in state elections but also established the broader principle that "wealth . . . is not germane" to voting. 383 U.S. at 668 (citing Johnson

Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter . . . an electoral standard."[10] *Id.* at 666.

The Court has applied this principle expansively, closely scrutinizing candidate filing fees because their impact on the franchise "is related to the resources of the voters supporting a particular candidate." *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *see also Lubin v. Panish*, 415 U.S. 709, 718 (1974) ("Selection of candidates solely on the basis of ability to pay a fixed fee . . . is not reasonably necessary to the accomplishment of the State's legitimate election interests."). Moreover, *Harper* itself made clear that it was prohibiting wealth discrimination in voting *regardless* of whether the right to vote could otherwise be restricted. 383 U.S. at 665 ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). Because SB-7066 does precisely what *Harper* prohibits—makes affluence an electoral standard for otherwise eligible voters who cannot afford to pay their outstanding LFOs—it violates the Fourteenth Amendment.

[10] Since *Harper* addressed not only poll taxes but also the broader question of wealth discrimination in voting, Secretary Lee's attempt to distinguish *Harper* as solely a

b. The State Cannot Impose Additional Punishment Solely Because of Inability to Pay.

The second exception outlined in *M.L.B.* also applies. "Cases applying this exception hold that punishment cannot be increased because of a defendant's inability to pay." Doc. 207 at 32 (citing *Bearden*, 461 U.S. 660). This Court has already recognized that felony disenfranchisement is a "punitive device stemming from criminal law." *Johnson*, 405 F.3d at 1228; *id.* at 1218 n. 5. Other courts agree. *See Muntaqim v. Coombe*, 366 F.3d 102, 123 (2d Cir. 2004), *vacated on other grounds*, 449 F.3d 371 (2d Cir. 2006) (en banc); *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).

Indeed, the Readmission Act of Florida allows for felony disenfranchisement only *if* it is imposed as punishment. Act of June 25, 1868, ch. 70, 15 Stat. 73, 73 (prohibiting any change to the state constitution that "deprive[s] any citizen or class of citizens of the United States of the right to vote . . . except as punishment for such crimes as are now felonies at common law").

Secretary Lee admits that Florida's felony disenfranchisement scheme is inherently punitive: "The overall intent of Amendment 4 was . . . to restore felons' voting rights only when their punishment was complete—when they paid their debt to society." Defs. Br. at c.0269 5d the4 df7.8112 0 TD.0- commob03 Tc.0002 Tw8B.

"contrary to the fundamental fairness required by the Fourteenth Amendment." *Bearden*, 461 U.S. at 671, 673; *see also United States v. Plate*, 839 F.3d 950, 956 (11th Cir. 2016) ("Plate was treated more harshly in her sentence than she would have been if she (or her family and friends) had access to more money, and that is unconstitutional.").

2. The *Bearden* Factors

In *Bearden*, the Court synthesized its wealth-discrimination cases as requiring a "careful inquiry" into four factors: (1)

lawful restriction of the right to liberty after a conviction did not make liberty a less important interest in *Bearden*, the lawful restriction of Plaintiffs' right to vote after their convictions does not diminish its importance.

Second, Plaintiffs' interest in voting has been affected to the fullest possible

167-35 at 3, 167-36 at 2 (showing collection agencies' discretion to negotiate and terminate LFO debt).[11] And even if granted, the

rely on a discretionary (and poorly functioning) process that itself hinges on payment of LFOs to excuse SB-7066's failure to account for ability to pay.

In *Johnson*, clemency was the only rights restoration mechanism available; thus, the fact that it was open to those unable to pay—albeit with a hearing—was sufficient. 405 F.3d at 1216 n.1. *Johnson* stands for the proposition that the State must "allow[] the lack of financial resources to be addressed as part of the same process through which other felons may obtain restoration of the right to vote" or another "equally accessible" method. Doc. 207 at 30. It is no answer to say that while those who can pay can automatically register, those who cannot must plead for an act of grace. *See, e.g.*, *Bearden*, 461 U.S. 660 (prohibiting imprisonment of probationer solely due to inability to pay LFOs); *Mayer*, 404 U.S. at 196-97 ("*Griffin* [represents] a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way.").

This Court has held that only "marginal" differences in the treatment of indigents can pass muster under the *Bearden* test. *Walker v. City of Calhoun*, 901 F.3d 1245, 1263 (11th Cir. 2018) (holding that a 48-hour increase in length of incarceration due to inability to pay bail is constitutional but an 11-day delay would

fee as a measure of a voter’s qualifications is to introdu

38. Moreover, there is no reason to believe that voters entitled to this relief will all need "individualized determinations." Defs. Br. at 30. Florida's voter registration system relies on voter affirmation as the primary means of establishing eligibility. Fla. Stat. § 97.053(5). And, there are numerous available benchmarks that the Secretary might employ to narrow the scope of cases that might require individualized inquiry. *See* Doc. 239 at 34:18-35:19. For those who do require individual determinations, Florida already grants a hearing to any registrant credibly identified as potentially ineligible. Fla. Stat. § 98.075(7)(a).

Finally, unlike the welfare benefits case cited by Secretary Lee, Plaintiffs' claim does not raise a question of whether "case by case adjudication" is superior to "[g]eneral rules" but rather whether the State must have *any* inability to pay mechanism. Defs. Br. at 30-31; *Califano v. Boles*, 443 U.S. 282, 284-85 (1979). Having made no effort to identify a system for implementing the district court's injunction and presented no evidence of actual costs, Secretary Lee cannot ask this Court to deny Plaintiffs' wealth discrimination claim based on presumptions.

C. Secretary Lee's Attempts to Distinguish the *Griffin-Harper-Bearden* Line of Cases Fail.

1. The Constitutionality of Felony Disenfranchisement Does Not Excuse Restricting Access to the Vote on Ability to Pay.

Secretary Lee argues that because people with felony convictions can lawfully be denied the right to vote under *Richardson*, *Harper* and *M.L.B.*'s rule that affluence cannot be made an electoral standard does not apply. Defs. Br. at 22-23. Not so.

First, Secretary Lee misunderstands the nature of fundamental rights in constitutional jurisprudence. Although fundamental rights can certainly be denied—in accordance with due process—rights do not change their fundamental status from person to person. The right to vote is no less important to a person with a conviction despite that person's lawful disenfranchisement. Although a person with a conviction can be lawfully denied the right to physical liberty, that loss of liberty cannot be extended because of inability to pay. *See, e.g., Williams*, 399 U.S. 235. Just as the right to physical liberty does

qualifications for the franchise. 418 U.S. at 53 (quoting *Lassiter v. Northhampton Cty. Bd. of Elections*, 360 U.S. 45, 51 (1959) ("Residence requirements, age, previous criminal record . . . are . . . factors which a State may take into consideration in determining the qualifications of voters." (internal quotation marks omitted))). It did not, as Secretary Lee contends, withdraw an entire class of people from any constitutional protection in their access to the right to vote.

Richardson and its progeny make clear that the *manner* in which states structure their felony disenfranchisement schemes must conform with the Fourteenth Amendment. In *Richardson,* the Court upheld felony disenfranchisement as a general matter but remanded the question of whether California's system violated the Equal Protection Clause due to lack of uniformity and arbitrariness. 418 U.S. at 56. Subsequent precedent reaffirms this principle. *See Hunter v. Underwood,* 471 U.S. 222 (1985); *Shepherd v. Trevino,* 575 F.2d 1110, 1114-15 (5th Cir. 1978)[15];

wealth is not a permissible electoral standard. Indeed, "[t]o in

666-67—would be nonsensical if

court case, *Madison v. State*, 163 P.3d 757 (Wash. 2007), is unavailing.[16] Notably, both cases were split decisions and, as the district court noted, in both cases, "the dissent had the better of it." Doc. 207 at 35. Other federal courts also have rejected the reasoning in these cases. *See Bynum v. Conn. Comm'n on Forfeited Rights*, 410 F.2d 173, 176 (2d Cir. 1969) (applying *Harper* in the voting rights restoration context); *Thompson v. Alabama*, 293 F. Supp. 3d 1313, 1332 (M.D. Ala. 2017) (denying Defendants' motion to dismiss an identical inability to pay claim).

Among other errors, *Bredesen* mirrors Secretary Lee's mistake in assuming that *Bearden* involved a fundamental right but that voting rights restoration does not. 624 F.3d at 748-49. Although there is no fundamental right to probation or rights restoration, there are fundamental rights to liberty and voting. And where a statutory scheme implicates such rights, they cannot be denied based on inability to pay. Likewise, *Madison* made the error of assuming that *Richardson* insulates felony disenfranchisement from any constitutional review. 163 P.3d at 768. *See supra* at 32-33.

Finally, Secretary Lee relies on inapplicable purposeful discrimination cases to argue that rational basis applies.[17] Defs. Br. at 25-27. The Supreme Court has

621 n.7 (5th Cir. 1981); *see also Variable Annuity Life Ins. Co. v. Laferrera*, 680 F. App'x 880, 886 (11th Cir. 2017).[19]

Moreover, "it is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). The district court's brief remarks on this issue hardly constitute a reviewable decision. The question of whether LFOs fall within the scope of an "other tax" under the Twenty-Fourth Amendment has not been decided by this Court or the Supreme Court and Plaintiffs intend to develop the record on their Twenty-Fourth Amendment claims at trial. *Cf. id.* at 121 ("The issue [sic] resolved by the Court of Appeals have never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue [in the first instance on appeal]."). This will include evidence regarding whether these LFOs are "taxes." Doc. 207 at 41-42 (noting the "functional approach" for determining whether an exactment constitutes a tax). At such time, the district court will be able to issue detailed findings of fact and conclusions of law on this issue; only then will it be ripe for this Court's review.

[19] Parties must not be permitted to "parlay" limited interlocutory appellate jurisdiction into "multi-issue interlocutory appeal tickets." *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 50 (1995).

III. SB-7066 Violates the Twenty-Fourth Amendment.

If the Court reaches the Secretary's Twenty-Fourth Amendment arguments, it should reject them. The Twenty-Fourth Amendment prohibits states from "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, § 1. SB-7066's LFO requirement will "den[y] or abridge[]" the right to vote for hundreds of thousands of Floridians. Nonetheless, Secretary Lee contends that SB-7066 does not impose a "poll tax" because it "does not deny or abridge any rights; it only restores them." Defs. Br. at 34-35. (quoting *Bredesen*, 624 F.3d at 751). Again, Secretary Lee misunderstands the constitutional principle. The Twenty-Fourth Amendment does not dictate who must be eligible to vote in the first instance, but rather flatly prohibits financial conditions on access to the right to vote. Having chosen to extend the right to vote to people with past convictions, Florida cannot do so in a manner that violates the Constitution's prohibitions on how the right to vote may be allocated.[20] *See Harper*, 383 U.S. at 665; *see also Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

The Twenty-Fourth Amendment's expansive language is intended to "nullif[y] sophisticated as well as simple minded modes" of taxing prospective

[20] For this reason, a law that prohibited 17-year-olds with outstanding parking tickets from voting would run afoul of the Twenty-Fourth Amendment, though it complies with the Twenty-Sixth. Likewise, a law that re-enfranchised only men with past convictions would violate the Nineteenth Amendment and a law that re-enfranchised only those above the age of forty would violate the Twenty-Sixth.

voters and extends to "equivalent or milder substitute[s]" to a poll tax. *Harman*, 380 U.S. at 540–41. The inclusion of the phrase "other tax" in addition to poll tax demonstrates that the Twenty-Fourth Amendment reaches beyond formal poll taxes to any state charge that must be paid in exchange for access to the ballot. At issue, therefore, is whether LFOs share "the essential feature of any tax: [the production of] at least some revenue for the Government." *Sebelius*, 567 U.S. at 564; *see also United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 606 (1975) (indicating that the "standard definition of a tax" is an "enforced contribution to provide for the support of government"). They do.

The revenue collected from LFOs imposed on people charged with felony crimes is primarily used to fund Florida's criminal justice system. *See* Fla. Const. Art. V, § 14; *Crist v. Ervin*, 56 So.3d 745, 752 (Fla. 2010) ("[C]ourt-related functions of the clerks' offices are to be funded entirely from filing fees and service charges."); *see also, e.g.*, Fla. Stat. §§ 142.01; 775.083(1) (directing criminal fines to be paid into the fine and forfeiture fund). Although fines may serve a punitive purpose,[21] they are also used to generate revenue for the state. Secretary Lee has acknowledged

[21] Although punitive intent may be significant in determining whether an assessment is functionally a tax, *see Sebelius*, 41 U.S. at 567-68, that is so only where legality of the assessment itself depends on its function, as it does with respect to Congress's taxing power. The same difference "may be immaterial" as here, "[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).

that the Florida's interest in conditioning rights restoration on payment of LFOs is, at least in part, remunerative. *See* Doc. 132 at 7; *see also id.* at 31; Sec'y. Br. at 10-13, *Adv. Op. to Gov. Re: Implementation of Amend. 4*, No. SC19-1341 (Fla. Sept. 19. 2019). Further, many mandatory fees and costs lack any punitive purpose, as they are imposed on criminal defendants regardless of whether adjudication is withheld, or the person is ultimately acquitted or convicted. *See, e.g.*, Fla. Stat. § 938.27(1) (imposing costs of prosecution on criminal defendants even where adjudication is withheld); Fla. Stat. § 27.52(1)(b) (requiring any criminal defendant seeking a public defender to pay an application fee even if the person is acquitted). Because the LFOs imposed under Florida law are used to generate revenue for the state, they are, functionally, taxes.

Much as she may want to, Secretary Lee cannot write the phrase "other tax" out of the Constitution. By conditioning rights restoration on payment of LFOs, SB-7066 violates the Twenty-Fourth Amendment.

IV. The District Court's Injunction Is Proper Because the Ruling Does Not Nullify Amendment 4 and the Remaining Factors Are Satisfied.

A. The District Court's Injunction is Proper Because the Opinion Does Not Nullify Amendment 4.

Secretary Lee argues that the district court's ruling nullifies Amendment 4 and thus Plaintiffs are not entitled to the relief ordered. This argument is unfounded.

1. As-Applied Claims Do Not Trigger a Severability Analysis.

Secretary Lee does not cite any legal authority to support her argument that the district court's as-applied constitutional ruling triggers a severability analysis. Indeed, the Secretary's counsel admitted that he "scoured" existing case law and could not find a case to support this position. Doc. 239 at 73:24-74:2.

As demonstrated by the wealth discrimination cases relied upon here, courts routinely grant relief on as-applied claims without engaging in any severability analysis. In *M.L.B.*, the Supreme Court did not engage in any analysis of whether the state's "interest in offsetting the costs of its court system," if unconstitutional as applied to those who cannot pay, was severable from its interest in providing the benefit of an appeal or in collecting record fees from those able to pay. 519 U.S. at 122. Nor did the Court engage in a severability analysis in any of the cases in the *Griffin-Bearden* line. *See, e.g.*, *Griffin*, 351 U.S. 12; *Mayer*, 404 U.S. 189; *Boddie*, 401 U.S. 371; *Williams*, 399 U.S. 235; *Bearden*, 461 U.S. 660. Further, the Court's practice of deciding as-applied challenges without reference to severability is consistent across civil rights jurisprudence.[22]

[22] *See*, e.g., *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (finding that states "may not constitutionally apply [] eligibility provisions" to deny a benefit offered by the state to a person solely because of their faith, without analyzing whether the expansion of eligibility for that benefit contradicted the state's intent in offering it); *Welsh v. U.S.*, 398 U.S. 333, 344 (1970) (extending the conscientious objector exemption to individuals who are not religious but whose "consciences . . . would give them no rest or peace if they allowed themselves to become a part of an

Only Justice Thomas has suggested that a severability analysis is appropriate

for the "normal rule" that where a statute is unconstitutional only in certain applications, "partial, rather than facial, invalidation is the required course," such that a "statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett v. Spokane*, 472 U.S. 491, 504 (1985).

The district court had no obligation to conduct a severability analysis before enjoining SB-7066 as applied to Plaintiffs.

2. The Injunction Does Not Implicate the Constitutionality of Amendment 4, Even as Interpreted by Secretary Lee.

Even assuming that severability is appropriate in the as-applied context, a severability analysis is unnecessary here because the district court's order does not implicate the constitutionality of any provision of Amendment 4, even as interpreted by Secretary Lee. The district court did not find that defining the phrase "all terms of sentence including probation and parole" to include LFOs for the purposes of rights restoration violates the Constitution. Nor did it find that Amendment 4's requirement that individuals "complete" their LFOs as a condition of rights restoration violates the Constitution. The Court's order merely states that Florida

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poses a significant threat of death or serious physical injury. 471 U.S. 1, 3 (1985). The court did not engage in any severability analysis, but rather held the statute was unconstitutional only in certain applications. *Id.* at 11-12. In *Brockett v. Spokane Arcades, Inc.*, the Court found that rather than striking a statute down as facially unconstitutional, the lower court could have adopted a more limited remedy *either* by enjoining enforcement of the statute as applied to the constitutionally protected conduct *or* by striking the overbroad provision, which it found severable. 472 U.S. 491, 505-507 (1985).

cannot constitutionally deny rights restoration to individuals solely because they are genuinely unable to *pay* their LFOs. Doc. 207 at 38.

Secretary Lee has already conceded that Amendment 4 does not necessarily require *payment* of LFOs for "completion" of a criminal sentence. *See* Doc. 207 at 38-39. This position is consistent with that of the Legislature and the Governor in interpreting Amendment 4. *See* Doc. 121 at 19 n.12 (citing Senate Hr'g Tr. at 6:35:50-6:38:38, May 2, 2019, colloquy between sponsors of SB-7066 acknowledging that defining "completion" to mean conversion of LFOs to civil lien would satisfy Amendment 4); *see also* Oral Argument at 16:57-17:24, *Advisory Op. Re. Implementation of Amend. 4*, SC19-1341 (Fla. Nov. 6, 2019), https://www.floridasupremecourt.org/Oral-Arguments/Videos-of-Oral-Argument-Broadcasts (counsel for the Governor clarifying that the definition of "completion" is not at issue in interpreting Amendment 4's mandate with respect to LFOs). Thus, nothing in the district court's order prevents Secretary Lee from complying with the requirements of both the Florida and United States Constitutions. The opinion merely invalidates SB-7066 to the extent it denies the right to vote to individuals who cannot *pay* their LFOs. The State has acknowledged that "completion" could mean something other than payment of LFOs but failed to define it in a manner that protects those genuinely unable to pay. *See* Fla. Stat. § 98.0751(2)(e). The district court's order leaves room for Florida to adopt any definition of "completion" that

will ensure its citizens are not denied the right to vote solely because they are unable to pay their LFOs.

3. Even Assuming Full Payment of LFOs Is Mandated by Amendment 4, this Non-Textual Requirement Is Severable.[25]

Even if severability were an appropriate consideration, its requirements would be met here. "[T]he purpose underlying severability [is] to preserve the constitutionality of enactments where it is possible to do so." *Ray v. Mortham*, 742 So. 2d 1276, 1281 (Fla. 1999). With respect to citizen-initiated constitutional amendments, courts "must . . . uphold [an] amendment if, after striking the invalid provisions, the purpose of the amendment can still be accomplished." *Id.* at 1281.

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> (4) an act complete in itself remains after the invalid provisions are stricken.

Wollschlaeger v. Governor, 848 F.3d 1293, 1318 (11th Cir. 2017) (quoting *State v. Catalano*, 104 So. 3d 1069, 1080 (Fla. 2012)). "[T]he key determination is whether the overall legislative intent is still accomplished without the invalid provisions." *Catalano*, 104 So. 3d at 1080-81. Thus, the "key determination" here is whether Floridians' overall purpose in amending Article VI § 4 will be furthered even absent an LFO requirement read into the text. *Id.* It will.

Amendment 4 added two provisions to the Florida Constitution. Taken together, the two provisions ended permanent disenfranchisement for all individuals convicted of crimes other than murder or a felony sexual offense by automatically restoring the right to vote upon completion of "all terms of sentence including parole or probation." Doc. 152-96. Secretary Lee not only argues that voters intended to include payment of LFOs as a condition of rights restoration under Amendment 4, but then also argues *ipse dixit* that voters' *overall* purpose was to deny rights restoration to individuals unless they are able to pay off their LFOs. This argument fails for two reasons.

First, Secretary Lee's analysis does not take into account the Amendment as a whole, but rests on one possible interpretation of one single phrase in one of the two subsections voters adopted. "Whether a [provision] is severable is determined by 'its relation to the overall legislative intent of the [enactment] of which it is part,

and whether the [enactment], less the invalid provisions, can still accomplish this intent.'" *Coral Springs Street Sys. v. City of Sunrise*, 371 F.3d 1320, 1347 (11th Cir. 2004) (quoting *Martinez v. Scanlan*, 582 So.2d 1167, 1173 (Fla. 1991)). Read as a whole, the overall purpose of the Amendment is clear: voters sought to end permanent disenfranchisement for the majority of Floridians with past convictions. Before Amendment 4, every Floridian with a past felony conviction was permanently disenfranchised, subject to the Governor's unlimited discretion. Fla. R. Exec. Clemency 4. After Amendment 4, only those convicted of murder or a felony sexual offense are subject to permanent disenfranchisement. Fla. Const. art. VI, § 4.

Severability is not precluded simply because it is "impossible to be *certain* that the voters would have adopted the amendment had it not contained [the challenged] provisions." *Ray*, 742 So. 2d at 1283. Where the remainder of an enactment continues to serve a sufficiently "compelling purpose," courts may infer that voters would still have approved the amendment absent the excised provision. *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991). Ending permanent disenfranchisement for the majority of Floridians with past convictions and re-enfranchising over a million Floridians is a sufficiently "compelling purpose" to infer that Floridians would have approved restoration even absent an LFO requirement. *Id.*

B. Plaintiffs Face Irreparable Harm and the Public Interest and Balance of the Equities Weigh Heavily in Plaintiffs' Favor.

The district court did not abuse its discretion in holding that the remaining factors all weigh in favor of Plaintiffs. Irreparable injury is presumed when a restriction on the right to vote is at issue. *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1223 (N.D. Fla. 2018) (quoting *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)). Once the election passes, "there can be no do-over and no redress." *Id.* (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)); *Madera v. Detzner*, 325 F. Supp. 3d 1269, 1282 (N.D. Fla. 2018) (same); Doc. 207 at 51 ("When an eligible citizen misses an opportunity to vote, the opportunity is gone forever; the vote cannot later be cast.").

The balance of the equities and public interest likewise fall in favor of ensuring that Plaintiffs are not deprived of the right to vote because of the size of their pocketbooks. *LWVF v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) ("The vindication of constitutional rights and the enforcement of a federal statute serve the public interest almost by definition."). The public interest "favors permitting as many qualified voters to vote as possible," *Obama for Ameria*, 697 F.3d at 437, so that every eligible voter "can exercise their constitutional right to vote," *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016).

Secretary Lee's arguments to the contrary rest on her inaccurate view of the merits. *See* Defs. Br. at 47-48 (arguing lack of irreparable injury because Plaintiffs are not entitled to the right to vote); *id.* at 51 (arguing that the balance of equities favors Defendants because Plaintiffs are not entitled to the right to vote); *id.* at 52 (arguing that the public interest favors Defendants because Plaintiffs are not entitled to the right to vote).

Absent this bootstrapping, Secretary Lee cannot argue that the district court abused its discretion in holding that the remaining factors favor Plaintiffs. Even if the district court's injunction imposes some administrative burden on Secretary Lee, requiring the Secretary to administer elections in a constitutional manner cannot tip the balance in the Secretary's favor.[27] *Fla. Democratic Party v. Detzner*, Case No. 4:16-cv-607, 2016 WL 6090943, at *8 (N.D. Fla. Oct. 16, 2016) (administrative inconvenience "cannot justify stripping Florida voters of their fundamental right to vote and to have their votes counted").

[27] Secretary Lee's complaint that the district court did not delineate the precise "ability to pay" standard rings hollow. Defs. Br. at 50, 52. That the district court gave the Secretary *more* flexibility to shape the remedy does not burden the Secretary. It allows her the discretion to craft a procedure that minimizes the burden while complying with the Constitution.

* * *

Although Florida was not required to re-enfranchise people with convictions, "once [it] affords that right . . . [it] may not bolt the door to equal justice." *M.L.B.*,

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 11th Cir. R. 32-4 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,997 as counted by the word-processing system used to prepare it.

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Dated: January 10, 2020

/s/ Danielle M. Lang
Counsel for Raysor *Plaintiffs-Appellees*

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 January 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: January 10, 2020

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