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Affording the Franchise: Amendment 4 & the Senate Bill 7066 Litigation

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AFFORDING THE FRANCHISE: AMENDMENT 4 & THE SENATE BILL 7066 LITIGATION

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Abstract

Felon re-enfranchisement statutes that condition the restoration of voting rights on the payment of legal financial obligations have been challenged under the Fourteenth and Twenty-Fourth Amendments to the U.S. Constitution. To date, these challenges have been unsuccessful because felons are not a protected class, disenfranchised felons do not have a fundamental right to vote under existing case law, and these financial obligations have not been categorized as unconstitutional poll taxes. The most recent struggle to defeat a discriminatory felon re-enfranchisement statute is in Florida, where different advocacy groups are attempting to defend the integrity of Amendment 4, the Voting Rights Restoration Amendment. Amendment 4 promised to automatically restore the voting rights of returning citizens (persons convicted of felonies) upon the completion of their sentence, including probation and parole. After Floridians overwhelmingly approved Amendment 4 in 2018, the Florida legislature passed Senate Bill 7066 (SB 7066), a statute defining the completion of sentence as encompassing the full payment of all court costs, fees, fines, and restitution. This Comment explores prior legal challenges to financially discriminatory re-enfranchisement schemes and the ongoing litigation over Amendment 4 and SB 7066.

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INTRODUCTION

Felon disenfranchisement is not a new phenomenon. The practice dates back to the framing of the Fourteenth Amendment,[1] and there is historical support for penal disenfranchisement in the colonial era.[2] However, felon disenfranchisement is inextricably tied to the United States history of racial discrimination.[3] Scholars have shown that legislatures added many felon disenfranchisement provisions to state constitutions in the post-Civil War era as a means to disenfranchise former slaves who had been granted the right to vote under the Reconstruction Amendments.[4]

Accordingly, the practice is also closely linked to the sabotage of democratic advancements and the expansion of the franchise. Today, most states engage in at least partial disenfranchisement,[5] limiting peoples' ability to vote while they are incarcerated or under supervision.[6] In fact, Maine and Virginia are the only two states that do not restrict the voting rights of persons convicted of felonies, including prisoners.[7] Eleven states indefinitely disenfranchise at least some persons with felony convictions.[8] Until 2018, Florida was one of four states whose constitution indefinitely disenfranchised persons with felony convictions.[9]

1. *See* Richardson v. Ramirez, 418 U.S. 24, 48 (1974) ("[A]t the time of the adoption of the [Fourteenth] Amendment, 29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes.").

2. *See* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1061.

3. *See, e.g.*, Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 564 (2003) (noting that many states adopted disenfranchisement provisions in the 1860s and 1870s, following the passage of the Fourteenth and Fifteenth Amendments).

4. *Id.* at 565.

5. JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1 tbl.1 (2019).

6. *Id.*

7. *Id.* at 2.

8. *Id.* at 1–2.

9. *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (May 31, 2019), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida [https://perma.cc/S8JF-VY6P].

On November 6, 2018, a majority[10] of Floridians passed Amendment 4, a citizens' initiative[11] that provided for automatic restoration of voting rights for convicted felons who completed their sentences (returning citizens).[12] Proponents of Amendment 4 estimated that the initiative would restore the voting rights of up to 1.4 million people.[13] Prior to the passage of Amendment 4, the Florida Constitution permanently disenfranchised returning citizens, unless they were granted restoration of their civil rights by the clemency board, which is made up of the governor and two members of the cabinet.[14] Under the Florida Rules of Executive Clemency, returning citizens had to wait five to seven years after the end of their sentence and supervision before applying to restore their civil rights.[15] Under Governor Rick Scott's eight-year tenure, the clemency board met only four times per year[16] and restored the civil rights of approximately 3,000 people.[17]

The passage of Amendment 4 seemed to be a resounding victory for voting rights, but during the spring 2019 legislative session, the Florida state legislature passed SB 7066.[18] The legislature enacted SB 7066 as "implementing language" to clarify the meaning of certain provisions of

10. Samantha J. Gross, *Florida Voters Approve Amendment 4 on Restoring Felons' Voting Rights*, MIAMI HERALD (Nov. 6, 2018, 9:18 PM), https://www.miamiherald.com/news/politics-government/election/article220678880.html [https://perma.cc/KYQ4-P2CT].

11. An initiative is "[a]n electoral process by which a percentage of voters can propose legislation and compel a vote on it by the legislature or by the full electorate. Recognized in some state constitutions, the initiative is one of the few methods of direct democracy in an otherwise representative system." *Initiative*, BLACK'S LAW DICTIONARY (11th ed. 2019).

12. To read the full text and ballot summary of Amendment 4, see *Voter Restoration Amendment Text*, ACLU FLA. (2020), https://www.aclufl.org/en/voter-restoration-amendment-text [https://perma.cc/R27Q-KPHU].

13. Frances Robles, *1.4 Floridians with Felonies Win Long-Denied Right to Vote*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/florida-felon-voting-rights.html [https://perma.cc/U5BU-U55V].

14. FLA. CONST. art. IV, § 8(a) (1998), *invalidated by* Hand v. Scott, 315 F. Supp. 3d 1244 (N.D. Fla. 2018), *vacated sub nom*. Hand v. DeSantis, 946 F.3d 1272 (11th Cir. 2020).

15. FLA. R. EXEC. CLEMENCY 9(A), 10(A). Restoration of civil rights includes the right to serve on juries and run for public office. *Cf. id.* (excluding only the right "to own, possess, or use" firearms from the civil rights that may be restored by the Clemency Board).

16. Greg Allen, *Felons in Florida Want Their Voting Rights Back Without a Hassle*, NPR (July 5, 2018, 7:23 AM), https://www.npr.org/2018/07/05/625671186/felons-in-florida-want-their-voting-rights-back-without-a-hassle [https://perma.cc/B8GE-2GT3].

17. MORGAN MCLEOD, THE SENTENCING PROJECT, EXPANDING THE VOTE: TWO DECADES OF FELONY DISENFRANCHISEMENT REFORM 7 (2018). In comparison, Governor Scott's predecessor, Governor Charlie Christ, restored voting rights for over 150,000 people during his four years in office. *Id.*

18. *CS/SB 7066: Election Administration*, FLA. SENATE, https://www.flsenate.gov/Session/Bill/2019/07066 [https://perma.cc/33ZX-9UBZ].

Amendment 4.[19] Most notably, SB 7066 defines "terms of a sentence" not merely as the term of imprisonment and supervision, but also as the payment of all fines, fees, restitution, and court costs the judge imposed at the time of sentencing.[20] SB 7066 requires returning citizens to pay all legal financial obligations (LFOs) before becoming eligible for automatic restoration of their voting rights.[21]

Since its introduction, commentators have criticized SB 7066 as a subversion of Amendment 4's purpose.[22] Despite these criticisms, the legislature passed SB 7066 on May 3, 2019,[23] and Governor Ron DeSantis signed the bill into law on June 28, 2019.[24] Almost immediately, several advocacy groups filed suit in the U.S. District Court for the Northern District of Florida, challenging the constitutionality of SB 7066.[25]

The passage of Amendment 4 and its subsequent demise by the Florida legislature offer two lessons. First, legislators are willing to subvert the popular will through so-called implementing legislation.[26]

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19. George Bennet, *DeSantis to Act Quickly on Water, Supreme Court, Broward Sheriff*, PALM BEACH POST (Dec. 12, 2018, 4:49 PM), https://www.palmbeachpost.com/news/20181212/exclusive-desantis-to-act-quickly-on-water-supreme-court-broward-sheriff [https://perma.cc/7L7G-6F8V].

20. The statute's exact language requires returning citizens to complete "any portion of a sentence that is contained in the four corners of the sentencing document." FLA. STAT. § 98.0751(2)(a) (2019). This includes the payment of fees, fines, costs, and restitution a court orders at the time of sentencing or as a condition of supervision. *Id.*

21. *Id.* § 98.0751(1), (2). Returning citizens could also satisfy payment of their LFOs by getting consent from the victim to terminate their obligation to pay restitution if they owe any; converting their LFOs into community service and completing the hours; or convincing the court to waive their LFOs. *Id.* § 98.0751(2)(e).

22. *See, e.g.*, Jesse L. Jackson Sr. & David Daley, *Don't Turn the Clock Back on Voting Rights*, BOS. GLOBE (Mar. 31, 2019, 7:01 PM), https://www.bostonglobe.com/opinion/2019/03/31/don-turn-clock-back-voting-rights/dneM1qaygyn4uJ9fGQPkTK/story.html [https://perma.cc/RH6Z-5XDU]; Mark Joseph Stern, *Florida Republicans Are Sabotaging a Constitutional Amendment that Gives Felons the Right to Vote*, SLATE (Mar. 20, 2019, 4:33 PM), https://slate.com/news-and-politics/2019/03/florida-republicans-felon-voting-rights-amendment-4.html [https://perma.cc/3AAS-TLJ3]; Orlando Sentinel Editorial Bd., *The Unfolding Sabotage of Amendment 4 and Voting Rights*, ORLANDO SENTINEL (Mar. 19, 2019, 3:40 PM), https://www.orlandosentinel.com/opinion/editorials/os-op-amendment-4-legislature-sabotage-voting-rights-20190319-story.html [https://perma.cc/P3DX-Y2KH].

23. *CS/SB 7066: Election Administration*, *supra* note 18.

24. Dara Kam, *Gov. Ron DeSantis Signs Florida Election Bill; Groups Sue over Voting Rights*, TALLAHASSEE DEMOCRAT (June 28, 2019, 9:00 PM), https://www.tallahassee.com/story/news/2019/06/28/desantis-signs-election-bill-groups-sue-over-voting-rights/1602545001/ [https://perma.cc/XA7T-U2QU].

25. *Id.*

26. Ironically, Florida legislators say they relied on statements Jon Mills, a co-author of Amendment 4, made to support their understanding of the phrase "all terms of . . . sentence." Daniel Rivero, *Co-Author and Attorney for Florida's Amendment 4 Helped Create Statewide*

Indeed, this is not the first time that the Florida legislature has undermined the purpose of a popular citizens' initiative. In 2016, Floridians passed Amendment 2, which created Florida's medical marijuana program.[27] Following its passage, the Florida legislature passed a statute prohibiting people from smoking medical marijuana.[28] As a result, the implementation of Amendment 2 was substantially delayed until 2019, when the Florida legislature and Governor Ron DeSantis repealed the ban on smoking medical marijuana.[29]

Second, the Amendment 4 debacle demonstrates that at least some state legislators will attempt to maintain felon disenfranchisement provisions in practice, if not in name, through discriminatory re-enfranchisement schemes. The practical effect of forcing returning citizens to pay their LFOs before restoring their voting rights is that some returning citizens will never regain their right to vote.

I. FINANCIAL BARRIERS TO RE-ENFRANCHISEMENT PRE-SB 7066

Like felon disenfranchisement provisions, felon re-enfranchisement laws that condition the restoration of voting rights on the payment of LFOs are not new. In the past, litigants have challenged these laws under both the Fourteenth and Twenty-Fourth Amendments to the U.S. Constitution.[30] However, before the passage of SB 7066 and the litigation challenging its constitutionality, these challenges were unsuccessful

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Fines and Fees Policy, WLRN (Mar. 27, 2019), https://www.wlrn.org/post/co-author-and-attorney-floridas-amendment-4-helped-create-statewide-fines-and-fees-policy#stream/0 [https://perma.cc/S483-PRJ5]. During a hearing in the Florida Supreme Court on the language of Amendment 4, Justice Ricky Polston asked Mills if "sentence" included "the full payment of any fines." *Id.* Mills responded, "All terms means all terms." *Id.*

27. *Summary of Florida's Amendment 2*, MARIJUANA POL'Y PROJECT (2020), https://www.mpp.org/states/florida/amendment2/ [https://perma.cc/282W-K36Y].

28. Senate Bill 8-A excluded "marijuana in a form for smoking" as a "medical use" of marijuana. S.B. 8-A, 2017 Leg., Spec. Sess. (Fla. 2017).

29. John Morgan was one of several parties to file suit against Florida, "[a]rguing that Florida legislators violated voters' intent when they prohibited smoking for the medical use of marijuana." Mary Ellen Klas, *John Morgan Sues State for Blocking the Smoking of Medical Marijuana*, MIAMI HERALD (July 6, 2017, 8:10 PM), https://www.miamiherald.com/news/politics-government/state-politics/article159856784.html [https://perma.cc/FD9T-8EJJ]. In 2019, the Florida legislature and Governor Ron DeSantis repealed the ban on smoking medical marijuana. Casey Leins, *Smokable Medical Marijuana Now Legal in Florida*, U.S. NEWS & WORLD REP. (Mar. 19, 2019), https://www.usnews.com/news/best-states/articles/2019-03-19/florida-gov-ron-desantis-signs-bill-lifting-ban-on-smokable-medical-marijuana [https://perma.cc/XM6G-5CAG].

30. Felon disenfranchisement in general has also been challenged on various constitutional grounds. *See, e.g.*, Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111, 115 (2013) (challenging felon disenfranchisement as viewpoint discrimination).

because courts were unwilling to accept claims that such re-enfranchisement schemes violate equal protection, abridge the fundamental right to vote, or constitute impermissible poll taxes.

A. *Fourteenth Amendment*

The failure of prior Fourteenth Amendment challenges to statutes that condition the restoration of voting rights on the payment of LFOs is due, at least in part, to the odd intersection at which these claims lie. These claims seemingly deal with a simple premise: re-enfranchisement statutes that require the payment of LFOs constitute wealth discrimination and abridge the fundamental right to vote. However, government classifications relating to wealth are generally constitutional if they rationally relate to a legitimate government interest. Furthermore, due to the plaintiffs' status as former felons and the existing case law on felon disenfranchisement, substantive due process arguments relating to the right to vote have been wholly unsuccessful.

The U.S. Supreme Court has held that legislation and government action that classifies persons on the basis of wealth only require rational basis review.[31] Under this standard, the government must show that the classification rationally relates to a legitimate governmental purpose.[32] Unless the wealth classification targets a suspect class[33] or abridges a fundamental right, judicial scrutiny will not be heightened.[34]

The Court has recognized that voting is a fundamental right.[35] In *Reynolds v. Sims*,[36] the Court considered an equal protection challenge to several legislative reapportionment[37] plans.[38] In striking down Alabama's discriminatory reapportionment schemes, the majority stated that "the right of suffrage is a fundamental matter in a free and [fair] society" and

31. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973). The *Rodriguez* plaintiffs alleged that the public school funding system, which relied on local property assessments, discriminated against students living in less affluent neighborhoods. *Id.* at 4–5, 28. Additionally, the plaintiffs argued that the funding system also abridged their fundamental right to education because their schools received less funding. *Id.* at 29.

32. *See id.* at 17, 55.

33. A suspect class has traditionally been "subjected to . . . a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1972).

34. *See id.* at 40.

35. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

36. 377 U.S. 533 (1964).

37. Reapportionment refers to the "[r]ealignment of a legislative district's boundaries to reflect changes in population and ensure proportionate representation by elected officials." *Reapportionment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

38. *Reynolds*, 377 U.S. at 536–37.

"any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[39]

Subsequently, in *Harper v. Virginia Board of Elections*,[40] the Court struck down Virginia's $1.50 poll tax under the Equal Protection Clause,[41] holding that a state may not make "the affluence of the voter or payment of any fee an electoral standard."[42] Following *Harper*, the Court continued to show skepticism over "[t]he use of the franchise to compel compliance with other, independent state objectives" and declared it "questionable in *any* context."[43]

Despite the Court's broad proclamations against financial barriers to the franchise, neither *Harper* nor its progeny dealt with the voting rights of convicted persons or financial barriers to the restoration of voting rights. Instead, courts have decided these issues under a line of cases that present a much less expansive view of the fundamental right to vote.

The U.S. Supreme Court has ruled that disenfranchised felons do not have a fundamental right to vote.[44] In *Richardson v. Ramirez*,[45] the Court held that felon disenfranchisement did not violate the Equal Protection Clause because Section Two of the Fourteenth Amendment explicitly allows disenfranchisement as punishment for a crime.[46] Because the Court has ruled that disenfranchised felons do not have a fundamental right to vote, courts typically apply rational basis review for classifications relating to felon disenfranchisement.[47] Courts have decided prior challenges to felon re-enfranchisement schemes relating to the payment of LFOs under *Richardson* and its progeny. Each time, courts have subjected these re-enfranchisement schemes to rational basis review and found them constitutional.[48]

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39. *Id.* at 561–62.

40. 383 U.S. 663 (1966).

41. *See id.* at 670.

42. *Id.* at 666.

43. Hill v. Stone, 421 U.S. 289, 299 (1975) (emphasis added) (invalidating a Texas law requiring persons to own property to vote in a local election and rejecting the state's interest in encouraging compliance with tax laws).

44. *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974).

45. 418 U.S. 24 (1974).

46. *Id.* at 54.

47. *See, e.g.*, Owens v. Barnes, 711 F.2d 25, 27 (3d Cir. 1983) ("[T]he right of convicted felons to vote is not 'fundamental'. . . . It follows that the standard of equal protection scrutiny to be applied when the state makes classifications relating to disenfranchisement of felons is the traditional rational basis standard."); Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978) ("[Felon disenfranchisement] laws must bear a rational relationship to the achieving of a legitimate state interest.").

48. *See, e.g.*, Harvey v. Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010); Johnson v. Bredesen, 624 F.3d 742, 746 (6th Cir. 2010); Madison v. State, 163 P.3d 757, 769 (Wash. 2007).

The U.S. Courts of Appeals for the Sixth and Ninth Circuits have both weighed in on the proper standard of review for felon re-enfranchisement statutes that require the full payment of LFOs.[49] Both circuit courts have refused to apply strict scrutiny[50] despite the plaintiffs' insistence that these schemes abridge their fundamental right to vote[51] or discriminate on the basis of wealth.[52] Instead, both circuit courts have subjected the respective schemes to rational basis review.[53] Under the deferential standard of rational basis review, the circuit courts held that a state could "rationally conclude that only those who have satisfied their debts to society . . . are entitled to restoration of their voting rights."[54]

At the state level, the Washington Supreme Court sustained a similar re-enfranchisement statute under both the state and federal constitutions in *Madison v. State*.[55] Like the federal courts, the Washington Supreme Court refused to subject the scheme to strict scrutiny.[56] However, in its analysis under the state constitution, the court did consider whether to apply intermediate scrutiny.[57] Under Washington precedent, if the plaintiffs can demonstrate that legislation or government action affect an "important right" or target a semi-suspect class, courts will apply intermediate scrutiny.[58] However, the court held that the plaintiffs did not meet their burden in demonstrating that felons' right to vote was an important right.[59] The court also concluded that the statute did not "classify based on wealth" but rather on plaintiffs' status as former felons.[60]

Prior to the passage of Amendment 4 and the SB 7066 litigation, plaintiffs challenged Florida's previous re-enfranchisement scheme[61] on wealth discrimination grounds under the Equal Protection Clause. In *Johnson v. Bush*,[62] the plaintiffs argued that conditioning the restoration of civil rights on the payment of restitution discriminated against

49. *See Bredesen*, 624 F.3d at 746; *Harvey*, 605 F.3d at 1079, 1081.

50. *See Bredesen*, 624 F.3d at 746; *Harvey*, 605 F.3d at 1079.

51. *See Bredesen*, 624 F.3d at 746; *Harvey*, 605 F.3d at 1079.

52. *See Bredesen*, 624 F.3d at 746; *Harvey*, 605 F.3d at 1071, 1078.

53. *See Bredesen*, 624 F.3d at 746; *Harvey*, 605 F.3d at 1079, 1081.

54. *Harvey*, 605 F.3d at 1079; *see also Bredesen*, 624 F.3d at 747 ("[T]he state's interests of encouraging . . . compliance with court orders, and requiring felons to complete their entire sentences . . . supply a rational basis . . . .").

55. 163 P.3d 757 (Wash. 2007).

56. *Id.* at 769.

57. *Id.*

58. *Id.* (quoting *In re* Runyan, 853 P.2d 424, 433 (1993)).

59. *Id.*

60. *Id.*

61. *See supra* notes 14–17 and accompanying text.

62. 214 F. Supp. 2d 1333 (S.D. Fla. 2002), *aff'd sub nom*. Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005) (en banc).

returning citizens lacking financial resources.[63] However, on appeal, the U.S. Court of Appeals for the Eleventh Circuit concluded that "Florida's Rules of Executive Clemency do not deny access to the franchise to those too poor to pay restitution"[64] because the Rules provide a waiver for restitution.[65] Sitting en banc, the Eleventh Circuit reiterated that "Florida does not deny access to the restoration of the franchise based on an ability to pay,"[66] presumably relying on the waiver for payment of restitution. Thus, prior to the passage of SB 7066, the Eleventh Circuit did not weigh in on the proper standard of review in cases concerning felon re-enfranchisement schemes that denied returning citizens access to voting based on their inability to pay LFOs.[67]

B. *Twenty-Fourth Amendment*

Most of the plaintiffs who challenged states' re-enfranchisement schemes under the Equal Protection Clause also argued that the LFOs functioned as poll taxes. The Twenty-Fourth Amendment bans the use of a "poll tax or other tax" to deny or abridge the franchise.[68] Unlike a wealth discrimination analysis, poll tax jurisprudence does not rely on levels of scrutiny but rather turns on whether a payment or fee can be characterized as a tax. In *Harman v. Forssenius*,[69] the Court construed the phrase "poll tax or other tax" broadly when it invalidated a Virginia law requiring voters to pay a poll tax or submit a certificate of residence.[70] The Court emphasized that the Twenty-Fourth Amendment "'nullifies sophisticated as well as simple-minded modes' of impairing the right" to vote.[71] *Harman* highlights that the definition of tax is neither rigid nor exact.

In the re-enfranchisement statute challenges, the poll tax argument has been largely unsuccessful. For example, the district court in *Bredesen* held that the financial requirement was not an unconstitutional poll tax

63. *See id.* at 1342.

64. Johnson v. Governor of Fla., 353 F.3d 1287, 1308 (11th Cir. 2003), *vacated*, (11th Cir. 2004) (en banc).

65. *See* Cherish M. Keller, Note, *Re-Enfranchisement Laws Provide Unequal Treatment: Ex-Felon Re-Enfranchisement and the Fourteenth Amendment*, 81 CHI.-KENT L. REV. 199, 222–23 (2006).

66. Johnson v. Governor of Fla., 405 F.3d 1214, 1216–17 n.1 (11th Cir. 2005) (en banc).

67. *See* Thompson v. Alabama, 293 F. Supp. 3d 1313, 1331 (M.D. Ala. 2017) ("Neither the U.S. Supreme Court nor the Eleventh Circuit has addressed the level of scrutiny applicable to equal protection challenges to felon re-enfranchisement laws.").

68. U.S. CONST. amend. XXIV.

69. 380 U.S. 528 (1965).

70. *See id.* at 531–33.

71. *Id.* at 540–41 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

but rather a legal obligation arising from the plaintiffs' sentences.[72] In so holding, the court reasoned that "[i]mposing a requirement that convicted felons comply with . . . outstanding court orders [to pay LFOs] cannot reasonably be construed as a 'tax' on voting."[73] In *Johnson*, the district court came to a similar conclusion.[74] On appeal, the Eleventh Circuit declined to reach the poll tax issue.[75]

Although the Sixth Circuit majority in *Bredesen* rejected the plaintiffs' poll tax claim, Judge Karen Moore, in her dissenting opinion, argued that the payment of fines, fees, and certain forms of restitution could be characterized as an unconstitutional poll tax.[76] The dissent adopted a broad definition of "tax": money levied by the government for the support of the government or the general public.[77] Judge Moore pointed out that the state levied an additional 5% from all child support payments, which the Tennessee statute required returning citizens to pay.[78] Furthermore, in several instances, restitution payments went to the state or federal government and functioned essentially as taxes.[79]

Despite these convincing points, prior to the SB 7066 litigation, no federal court has held that the payment of LFOs as a condition of voting rights restoration constitutes a poll tax or "other tax" under the Twenty-Fourth Amendment.

II. THE SB 7066 LITIGATION

The various opinions the SB 7066 litigation spawned have led to significant developments in the case law on financial barriers to felon re-enfranchisement. In its order denying Florida's motion to dismiss and granting the plaintiffs' motion for a preliminary injunction, the Northern District of Florida made it clear that Florida could not condition the restoration of returning citizens' voting rights on their inability to pay

72. *See* Johnson v. Bredesen, 579 F. Supp. 2d 1044, 1059 (M.D. Tenn. 2008).

73. *Id.*

74. Johnson v. Bush, 214 F. Supp. 2d 1333, 1343 (S.D. Fla. 2002) ("The victim restitution requirement is not a special fee that they must pay in order to exercise a right already existing in them, but a requirement made within the authority of the State to begin the process of having their civil rights fully restored."), *aff'd sub nom*. Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005) (en banc).

75. *Johnson*, 405 F.3d at 1217 n.1 ("[W]e say nothing about whether conditioning an application for clemency on paying restitution would be an invalid poll tax.").

76. *See Bredesen*, 624 F.3d at 770 (Moore, J., dissenting).

77. *Id.* at 769.

78. *Id.* at 770.

79. *See id.* at 770–71.

LFOs.[80] Although the court acknowledged that states may condition the restoration of voting rights on the satisfaction of at least some LFOs,[81] it expressed doubts as to whether these financial restrictions would pass constitutional muster when applied to an individual who *cannot* pay.[82]

The court's analysis rested primarily on a footnote in *Johnson v. Governor of Florida*,[83] where the Eleventh Circuit stated that "[a]ccess to the franchise cannot be made to depend on an individual's financial resources."[84] Indeed, the only reason that the Eleventh Circuit approved Florida's previous restoration scheme under the Florida Rules of Executive Clemency was "[b]ecause Florida [did] not deny access to the restoration of the franchise based on ability to pay"[85] since the state provided waivers to returning citizens who could not afford to pay restitution.[86]

The district court concluded that the *Johnson* footnote "establishes two things."[87] First, Florida cannot deny returning citizens the restoration of their voting rights solely because they "do[] not have the financial resources to pay restitution."[88] The court determined that the *Johnson* reasoning applies with equal force to other LFOs.[89] Second, Florida will not offend the Constitution if it creates a process for demonstrably indigent returning citizens to obtain re-enfranchisement.[90] To that end, Florida could "properly place the burden of establishing inability to pay on the [returning citizens] and . . . put in a place an appropriate administrative process."[91]

The district court observed that this "administrative process" could be integrated into the same six-step "process available to others whose right to vote has been restored under Amendment 4 and SB 7066."[92] That

80. Jones v. DeSantis, 410 F. Supp. 3d 1284, 1301, 1304 (N.D. Fla. 2019), *aff'd sub nom*. Jones v. Governor of Fla., 950 F.3d 795 (11th Cir. 2020).

81. *Id.* at 1300.

82. *See id.* ("The analysis to this point does not, however, resolve the claim based on inability to pay.").

83. 405 F.3d 1214, 1216 n.1 (11th Cir. 2005) (en banc).

84. *DeSantis*, 410 F. Supp. 3d at 1301 (emphasis omitted) (quoting *Johnson*, 405 F.3d at 1216 n.1).

85. *Id.* at 1300 (emphasis omitted) (quoting *Johnson*, 405 F.3d at 1217 n.1).

86. *See supra* notes 64–65 and accompanying text.

87. *DeSantis*, 410 F. Supp. 3d at 1301. The court also dedicated a significant portion of the order to explaining why the *Johnson* footnote is controlling and not merely dicta. *Id.* Specifically, the court noted that the fact "[t]hat an issue is resolved in a footnote rather than in the text of an opinion makes no difference." *Id.*

88. *Id.*

89. *See id.*

90. *See id.*

91. *Id.* at 1303.

92. *Id.* at 1303–04.

process is the existing voter registration and verification process that Supervisors of Election and the Florida Secretary of State already undertake to determine whether an individual is an eligible voter.[93] At some point throughout this process, indigent returning citizens can be given the opportunity to either explain their inability to pay any disqualifying LFOs or contest the Secretary of State and Supervisor of Elections' determination of ineligibility to register to vote through a hearing.[94] This process, or any similar "constitutionally acceptable alternative method,"[95] is available to the Florida legislature.[96]

The district court emphasized that an accommodation for indigents is "consistent with a series of [U.S.] Supreme Court decisions,"[97] relying primarily on *M.L.B. v. S.L.J.*[98] and *Harper*. In *M.L.B.*, the Court laid out two exceptions to "the 'general rule' that equal-protection claims based on indigency are subject to only rational-basis review."[99] The first exception relates to claims involving voting rights, and the second exception applies to "criminal or quasi-criminal processes."[100] The district court emphasized that the idea that "punishment cannot be increased because of a defendant's inability to pay"[101] applies with equal force to re-enfranchisement schemes.[102]

Following the district court's preliminary injunction order, the Florida Supreme Court weighed in on the meaning of Amendment 4 after Governor DeSantis asked the court for an advisory opinion.[103] The Florida Supreme Court held that "the phrase ['all terms of sentence'] . . . plainly refers to obligations and includes 'all'—not some—LFOs imposed in conjunction with an adjudication of guilt."[104] However, since the Florida Supreme Court's interpretation of Amendment 4 is not dispositive of the constitutionality of SB 7066, the federal case proceeded.[105]

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93. *See id.* at 1304.

94. *See id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1301.

98. 519 U.S. 102 (1996).

99. *DeSantis*, 410 F. Supp. 3d at 1302 (quoting *M.L.B.*, 519 U.S. at 123).

100. *Id.*

101. *Id.*

102. *See id.*

103. Advisory Opinion to the Governor Re: Implementation of Amendment 4, The Voting Restoration Amendment, 288 So. 3d 1070, 1072 (Fla. 2020).

104. *Id.* at 1075 (quoting FLA. CONST. art. VI § 4(a)).

105. *See Advisory Opinion to the Governor Re: Implementation of Amendment 4, the Voting Restoration Amendment*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), https://www.brennancenter.org/our-work/court-cases/advisory-opinion-governor-re-implementation-amendment-4-voting-restoration [https://perma.cc/KB6F-DMJ4] ("The state court did not interpret the U.S.

Florida appealed the district court's order granting the plaintiffs' preliminary injunction.[106] On January 28, 2020, a three-judge panel of Eleventh Circuit judges heard oral arguments.[107] The panel seemed concerned with two questions: (1) determining the amount or proportion of returning citizens that SB 7066 would continue to disenfranchise because of their inability to pay,[108] and (2) how Florida could determine who was unable to pay.[109] Because Florida filed the appeal after only the order granting the plaintiffs' preliminary injunction, the Eleventh Circuit did not have a substantial factual record to work from.

Despite these unanswered questions, the Eleventh Circuit issued an opinion affirming the district court's preliminary injunction on February 19, 2020.[110] In the opinion, the Eleventh Circuit explicitly disagreed with the Sixth Circuit's decision on the appropriate standard of review for felon re-enfranchisements schemes that require payment of LFOs and disproportionately affect indigent returning citizens.[111] Instead, the Eleventh Circuit held that "heightened scrutiny applies"[112] in the SB 7066 challenge, creating a split of authority between the circuit courts on the issue. Despite its focus on heightened scrutiny for the holding, the panel also expressed doubts as to SB 7066's constitutionality under rational basis review.[113] However, the court's rational basis analysis distinguished between an as-applied challenge and a facial challenge to SB 7066.[114] While the court believed that the plaintiffs had successfully demonstrated their indigency,[115] they failed to demonstrate that the "mine-run" of

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Constitution or federal law. It answers a narrow question of state law and does not alter the Florida legislature's obligations to abide by the U.S. Constitution."). The Brennan Center is one of many legal advocacy groups taking part in the Amendment 4/SB 7066 litigation.

106. Lawrence Mower, *Gov. DeSantis Appeals Judge's Order in Amendment 4 Lawsuit*, TAMPA BAY TIMES (Nov. 15, 2019), https://www.tampabay.com/florida-politics/buzz/2019/11/15/gov-desantis-appeals-judges-order-in-amendment-4-lawsuit/ [https://perma.cc/32K8-XXL2].

107. Lawrence Mower, *Judges Challenge DeSantis Attorney About Fairness of Amendment 4 Bill*, TAMPA BAY TIMES (Jan. 28, 2020), https://www.tampabay.com/florida-politics/buzz/2020/01/28/judges-challenge-desantis-attorney-about-fairness-of-amendment-4-bill/ [https://perma.cc/8KW2-PPUP].

108. Oral Argument at 52:54, Jones v. Governor of Fla., 950 F.3d 795 (11th Cir. 2020) (No. 19-14551), http://www.ca11.uscourts.gov/oral-argument-recordings?title=19-14551&field_oar_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D= [https://perma.cc/FH3L-3VZE].

109. *Id.* at 54:10. Senior Judge Stanley Marcus questioned how Florida could determine who was indigent without placing an "administrative burden" on the state. *Id.*

110. Jones v. Governor of Fla., 950 F.3d 795, 833 (11th Cir. 2020).

111. *Id.* at 808–09.

112. *Id.* at 809.

113. *Id.*

114. *See id.* at 810, 813.

115. *See id.* at 812.

returning citizens are indigent, making the LFO payment requirement "irrational as applied to the class as a whole."[116] Accordingly, the Eleventh Circuit remanded the case to the district court and the trial took place in late April.[117]

On May 24, 2020, the district court finally struck down the "pay-to-vote system"[118] SB 7066 established. First, the court restated "[t]he Eleventh Circuit's holding in *Jones v. Governor of Florida*: Florida's pay-to-vote system, at least as applied to those unable to pay, is subject to heightened scrutiny."[119] Although Florida reiterated its interest in only re-enfranchising returning citizens who had fully completed their sentences at the trial, the district court opinion pointed out that the Eleventh Circuit had already rejected this stated interest as irrational when applied to those genuinely unable to pay.[120]

As to the "mine-run" of returning citizens, the district court—relying on the expert testimony of Dr. Daniel A. Smith, a political scientist and professor at the University of Florida—concluded that the record now showed that the majority of individuals affected by SB 7066 are genuinely unable to pay their LFOs.[121] Accordingly, SB 7066 failed to pass even rational basis scrutiny.[122]

Aside from the equal protection violations, the district court also held that requiring returning citizens to pay certain LFOs—so-called fees and costs—violated the Twenty-Fourth Amendment.[123] The district court acknowledged that other courts that had addressed whether LFOs constitute impermissible poll taxes consistently held that these "preexisting obligation[s]" were not poll taxes.[124] However, the court adopted a functional approach to defining taxes, focusing on whether the LFO raises "at least some revenue for the [g]overnment."[125] Under that approach, the district court found that the government imposes certain fees and costs solely to fund Florida's clerks of court,[126] making their

116. *Id.* at 814.

117. Daniel Rivero, *Voting Rights for Hundreds of Thousands of Felons at Stake in Florida Trial*, NPR (Apr. 27, 2020, 5:00 AM), https://www.npr.org/2020/04/27/844297011/ voting-rights-for-hundreds-of-thousands-of-felons-at-stake-in-florida-trial [https://perma.cc/WL H6-4ZAS].

118. Jones v. DeSantis, No. 4:19cv300-RH/MJF, 2020 WL 2618062, at *1 (N.D. Fla. May 24, 2020), *appeal filed sub nom*. Jones v. Governor of Fla., No. 20-12003, 2020 WL 2618062 (11th Cir. June 1, 2020).

119. *Id.* at *13.

120. *Id.* at *14.

121. *Id.* at *16 & n.82.

122. *Id.* at *16.

123. *See id.* at *29.

124. *Id.* at *27.

125. *Id.* (quoting NFIB v. Sebelius, 567 U.S. 519, 564 (2012)).

126. *See id.* at *28.

"sole or at least primary purpose [to raise] revenue . . . for government operations."[127]

III. ANALYSIS

The judicial opinions resulting from the SB 7066 litigation represent a significant—and necessary—shift in the jurisprudence on the constitutionality of state re-enfranchisement schemes that require full payment of LFOs. Prior to the SB 7066 litigation, the federal courts entertaining challenges to these statutory schemes engaged in an almost mechanical analysis that virtually ensured the government's victory. Courts dismissed Twenty-Fourth Amendment arguments easily, as they could simply explain that LFOs were not taxes but rather criminal penalties.[128] Fourteenth Amendment challenges fared no better: if the plaintiffs alleged an equal protection challenge relating to wealth discrimination, courts would remind the plaintiffs that wealth was not a suspect classification and thus summarily approve of the re-enfranchisement scheme.[129] If the plaintiffs alleged a substantive due process challenge relating to abridgement of the right to vote, courts would merely cite *Richardson* and reiterate that felons did not have a fundamental right to vote.[130] Without a chance of elevating judicial scrutiny, these challenges consistently failed after courts found no issue justifying the continued disenfranchisement of thousands of people under the deferential standard of rational basis review.

The Eleventh Circuit and the district court's approaches to this issue present a departure from this formulaic analysis. What makes these opinions laudable is their recognition of the functional consequences of their legal decisions. By applying heightened scrutiny to SB 7066, these two courts recognized that the practical effect of requiring returning citizens to pay LFOs before restoration of their voting rights is to indefinitely extend the punishment of those who cannot pay. "[W]hen the purpose of disenfranchisement is to punish,"[131] tying restoration of a person's voting rights to their ability to pay effectively punishes indigency. The fact that the punishment is not imprisonment is irrelevant. As the Florida legislature itself has gone to great lengths to make clear, the terms of a penal sentence transcend imprisonment. All that the district court and the Eleventh Circuit opinions correctly note is that the U.S.

127. *Id.* at *29.

128. *See supra* notes 72–75 and accompanying text.

129. *See supra* notes 48–54 and accompanying text.

130. *See supra* notes 47–54 and accompanying text.

131. Jones v. DeSantis, 410 F. Supp. 3d 1284, 1302 (N.D. Fla. 2019), *aff'd sub nom*. Jones v. Governor of Fla., 950 F.3d 795 (11th Cir. 2020).

Supreme Court has placed constitutional limits on states' ability to extend punishment based solely on an individual's inability to pay an LFO.

Not only is the current resolution[132] of the SB 7066 litigation the correct outcome under the case law, it is also justified by the administrative failures exposed after the full trial on the merits. The plaintiffs demonstrated the overwhelming difficulty returning citizens face when trying to determine how to satisfy their obligations.[133] The reality is that Florida does not have a central repository of returning citizens' judgments, which is often the only document reflecting the LFOs judges impose at sentencing.[134] Records of decades-old convictions are often unavailable or inaccessible.[135] The state does not have a consistent means of tracking how much money a returning citizen has already paid, particularly when he pays the amount directly to a victim—as is the case for many restitution payments—or when the state has shifted the burden to a collection agency.[136] The administrative difficulties were so great that at the time of the trial—eighteen months after the adoption of Amendment 4—the Florida State Department's Division of Elections had not processed a single registration out of the 85,000 outstanding registrations from returning citizens.[137] In short, Florida was not "reasonably administering"[138] its own pay-to-vote system.

CONCLUSION

The legal battle over Amendment 4 and SB 7066 has provided a crucial insight into the legacy of felon disenfranchisement. Amendment 4 promised to do away with a punitive measure that denied many returning citizens a "second chance."[139] Instead, the Florida legislature muddied the waters by passing so-called implementing legislation that gutted the spirit of Amendment 4. Despite this lamentable setback, the litigation SB 7066 spawned has made significant progress on case law

132. *See* News Serv. of Fla., *Court Speeds Up Voting Rights Appeal*, WFSU (June 14, 2020, 8:54 PM), https://news.wfsu.org/wfsu-local-news/2020-06-14/court-speeds-up-voting-rights-appeal [https://perma.cc/WYB5-2FY7] (highlighting the rapid developments on this issue in advance of the November election).

133. *See* Jones v. DeSantis, No. 4:19cv300-RH/MJF, 2020 WL 2618062, at *16–24 (N.D. Fla. May 24, 2020), *appeal filed sub nom*. Jones v. Governor of Fla., No. 20-12003, 2020 WL 2618062 (11th Cir. June 1, 2020).

134. *See id.* at *16.

135. *Id.* at *17.

136. *Id.* at *18–20.

137. *See id.* at *24.

138. *Id.* at *25.

139. Groups advocating for the passage of Amendment 4 mounted a campaign that urged voters to vote "yes" and give "fellow citizens a second chance." *Cf.* Andrew Satter et al., Video: *How to Get 1.4 Million New Voters*, N.Y. TIMES (Oct. 8, 2018), https://www.nytimes.com/2018/10/08/opinion/how-to-get-1-4-million-new-voters.html [https://perma.cc/W75N-QSYG].

that has long sanctioned other discriminatory felon re-enfranchisement schemes.