IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO
THE GOVERNOR

Case No. SC19-1341

RE: IMPLEMENTATION OF
AMENDMENT 4, THE
VOTING RESTORATION
AMENDMENT

BRIEF OF INTERESTED PARTIES BONNIE RAYSOR, DIANE SHERRILL, AND LEE HOFFMAN

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STATEMENT OF THE CASE AND OF THE FACTS

This case arises from Governor Ron DeSantis's August 9, 2019 request to this Court for an Advisory Opinion on whether Amendment 4's requirement of "completion of all terms of sentence encompasses financial obligations, such as fines, fees and restitution ('legal financial obligations' or 'LFOs')." Request for Advisory Op. at 1.

Prior to November 2018, Florida was one of only three states that permanently disenfranchised its citizens for committing a single felony offense, unless a person was granted restoration of her civil rights at the discretion of the Florida Board of Executive Clemency. *See* Br. of the Sentencing Project as *Amicus Curiae*, *Hand v. Scott*, No. 18-11388, 2018 WL 3328534, at *5 (11th Cir. June 28, 2018). Under the previous scheme, the State of Florida disenfranchised a higher percentage of its adult citizens than any other state in the United States (over 10 percent of the overall voting age population) and was responsible for more than 25 percent of the approximately 6.1 million U.S. citizens disenfranchised nationwide on the basis of felony convictions. *Id* at *14-16; *Hand v. Scott*, 285 F. Supp. 3d 1289, 1310 (N.D. Fla. 2018).

On November 6, 2018, more than five million Floridians voted to implement a sweeping overhaul of Florida's disenfranchisement regime by passing Amendment 4 to the Florida Constitution, with 64.6 percent of ballots cast in support of the

Amendment. Fla. Div. of Elections, *Voting Restoration Amendment 14-01*, https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=64388&seqnum=1 (last visited Sep. 17, 2019). Amendment 4 provides as follows:

> (a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. Except as provided in subsection (b) of this section, any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.
>
> (b) No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.

Art. VI, § 4, Fla. Const. (text added by Amendment 4 underlined). As discussed further herein, it was regularly reported and widely understood that Amendment 4 would automatically restore voting rights to nearly one and a half million people in Florida upon becoming effective on January 8, 2019. *See, e.g.,* Samantha J. Gross & Elizabeth Koh, *What is Amendment 4 on Florida ballot? It Affects Restoration of Felons' Voting Rights*, Miami Herald (Oct. 5, 2018), https://www.miamiherald.com/news/politics-government/election/article219547680.html (estimated 1.6 million); Steven

Lemongello, *Floridians Will Vote This Fall on Restoring Voting Rights to 1.5 Million Felons*, Fla. Sun-Sentinel (Jan. 23, 2018), https://www.sun-sentinel.com/news/politics/os-florida-felon-voting-rights-on-ballot-20180123-story.html (estimated 1.5 million).

Following the voters' adoption of Amendment 4, the legislature passed SB 7066, which sought to implement Amendment 4 and clarify its provisions. Federal litigation challenging SB 7066 is ongoing. *See Jones et al. v. DeSantis et al.*, Consolidated Case No. 4:19-cv-00300-RH-MJF (N.D. Fla. 2019). Bonnie Raysor, Diane Sherrill, and Lee Hoffman are plaintiffs in that federal litigation; all three are Floridians who were disenfranchised due to past felony convictions and who are now disenfranchised under SB 7066 because they owe outstanding LFOs.

Bonnie Raysor is a 58-year-old United States citizen and resident of Boynton Beach, Florida. After becoming addicted to opioids, Ms. Raysor was charged in 2009 and convicted in October 2010 of six felony and two misdemeanor drug-related charges. She was sentenced to one year, six months, and five days in prison. Ms. Raysor was released from prison on March 29, 2011, with no parole or probation. She has no other criminal convictions. Ms. Raysor has $4,260 in outstanding fines and fees related to her felony and misdemeanor convictions, which include, *inter alia*, court costs, cost of prosecution, crime stoppers fund, cost of investigation, drug trust fund, public defender application fee, and public defender fee. Based on her

payment plan with the court, Ms. Raysor will not be able to pay off her LFOs until 2031.

Diane Sherrill is a 58-year-old United States citizen and resident of St. Petersburg, Florida. As a result of her struggle with addiction, Ms. Sherrill was convicted of one count of possession of crack cocaine in the third degree, two counts of possession of cocaine in the third degree, and one count of prostitution in the third degree between 1999 and 2005. Ms. Sherrill owes $2,279 in outstanding LFOs related to her convictions, which include, *inter alia*, indigent criminal defense fees, fines, investigative costs, court costs, and penalties for nonpayment. Ms. Sherrill is indigent and cannot foresee a time when she will ever be able to pay her LFOs in full.

Lee Hoffman is a 60-year-old United States Citizen, military veteran, and resident of Plant City, Florida. Mr. Hoffman has six previous nonviolent felony convictions: a burglary conviction in Pinellas County, Florida in 1978, a robbery conviction in Los Angeles County, California in 1985, four convictions in Hillsborough County for criminal mischief in 1995, grand theft in 2001, and driving without a license and possession of cocaine in 2006. He has had no felony convictions since 2006, and completed his term of probation in 2008. Mr. Hoffman owes a total of $1,772.13 in outstanding LFOs, $469.88 of which he believes are

associated with his felony conviction. Based on his current fixed income, Mr. Hoffman will not be able to pay these outstanding LFOs before the 2020 elections.

Ms. Raysor, Ms. Sherrill, and Mr. Hoffman submit this brief to urge this Court to adopt an interpretation of Article VI, § 4 of the Florida Constitution that aligns with the will of the Florida voters and will protect their federal constitutional rights.

SUMMARY OF ARGUMENT

Article VI, § 4 of the Florida Constitution, which grants automatic rights restoration to otherwise eligible Floridians with past felony convictions upon completion of sentence, cannot be interpreted to require that such individuals pay off certain outstanding legal debts in order to be eligible to vote.

Article VI, § 4 states that for individuals with non-disqualifying felony convictions, "voting rights shall be restored upon completion of all terms of sentence including parole or probation." Although the plain language of Article VI, § 4 clearly and unambiguously requires returning citizens to complete any term of incarceration or supervision before their rights will be restored, there is no such clear and unambiguous requirement that individuals pay off outstanding legal financial obligations ("LFOs"). Absent any directive to the contrary, this Court should find that the plain text of Article VI, § 4 does not require payment of LFOs as a condition for automatic rights restoration.

At most, Article VI, § 4 is ambiguous as to whether it requires payment of LFOs as a condition for rights restoration. Indeed, both the Governor and the Secretary of State have affirmatively argued that the phrase "completion of all terms of sentence" is "susceptible" to more than one interpretation, *see* State Defs.' Br. in Support of Motion to Dismiss at 13, *Jones v. DeSantis*, No. 4:19-cv-00300, (N.D. Fla. Aug. 2, 2019), Dkt. 97. Only after submitting that argument to the federal court assessing SB 7066 did the Governor seek the opinion of this Court on the matter. *See* Request for Advisory Op. at 4, *Advisory Op. to the Gov. Re: Implementation of Amendment 4, the Voting Restoration Amendment*, No. SC19-1341 (Fla. Aug. 9, 2019) ("Adv. Op. Request"). In light of this conceded ambiguity—and the host of constitutional and practical problems arising from an LFO requirement—the Court should interpret "completion of all terms sentence" to exclude LFOs for the purposes of automatic rights restoration.

Interpreting the phrase "all terms of sentence" to include LFOs would raise serious constitutional problems; contradict the will of the voters; and conflict with prior interpretations of "completion of sentence" for the purpose of rights restoration. Thus, the Court should interpret Article VI, § 4 of the Florida Constitution as excluding LFOs from the phrase "completion of all terms of sentence." In the alternative, it should decline to read a specific LFO requirement into the text and should instead find that "all terms of sentence" includes only such

terms as established by the legislature and consistent with the voters' understanding and intent at the time Article VI, § 4 was enacted.

ARGUMENT

I. Legal Standards

"The object of constitutional construction is to ascertain and effectuate the intention and purpose of the people in adopting it." *Amos v. Matthews*, 126 So. 308, 316 (1930). Courts must first examine the text of the provision, and if it is "'clear, unambiguous, and addresses the matter at issue,' [the provision] is enforced as written." *W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So. 3d 1, 9 (Fla. 2012) (quoting *Ford v. Browning*, 992 So. 2d 132, 136-37 (Fla. 2008)). Where the plain language of the provision is ambiguous, however, courts must construe the provision "in such a manner as to fulfill the intent of the people, never to defeat it [and] never in such manner as to make it possible for the will of the people to be frustrated or denied." *Gray v. Bryant*, 125 So. 2d 846, 852 (Fla. 1960). As such, "the objective to be accomplished and the evils to be remedied by the constitutional provision must be constantly kept in view." *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979).

Constitutional provisions must be construed "as a whole, to ascertain the general purpose and meaning of each part." *Dep't of Envtl. Prot. v. Millender*, 666 So. 2d 882, 885-86 (Fla. 1996). As such, "each subsection, sentence, and clause must be read in light of the others to form a congruous whole, so as not to render any language superfluous." *Id.* Furthermore, "[w]here the constitution contains multiple

provisions on the same subject, they must be read *in pari materia* to ensure a consistent and logical meaning that gives effect to each provision." *Adv. Op. to Gov. Re: 1996 Amendment 5 (Everglades)*, 706 So. 2d 278, 281 (Fla. 1997).

Courts "are not at liberty to add words" to a constitutional provision, "which were not placed there by the drafters of the Florida Constitution" *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 512 (Fla. 2008). And, "unless the text of the constitution suggests that a technical meaning is intended, words used in the constitution should be given their usual and ordinary meaning, because such is the meaning most likely intended by the people who adopted the constitution." *Id.*

Finally, when a provision of law employs the word "including" to introduce an enumerated list, the listed items are "an illustrative application of the general principle." *Pro-Art Dental Lab, Inc. v. V-Strategic Grp., LLC*, 986 So. 2d 1244, 1257 (Fla. 2008) (quotation marks and emphasis omitted). In such cases, "the illustrative list guides courts in their interpretation of what types of non-enumerated" items fall within the scope of the provision. *White v. Mederi Caretenders Visiting Servs. of Se. Fla., LLC*, 226 So. 3d 774, 784 (Fla. 2017); *see also State v. Hearns*, 961 So. 2d 211, 219 (Fla. 2007) (applying doctrine of "*ejusdem generis*, which states that when a general phrase follows a list of specifics, the general phrase will be interpreted to include only items of the same type as those listed").

II. In the absence of an unambiguous LFO requirement, this Court should interpret Article VI, § 4 to automatically restore voting rights to eligible returning citizens upon completion of any term of incarceration or supervision.

A. Article VI, § 4 of the Florida Constitution does not require payment of LFOs as a condition for voting rights restoration.

Article VI, § 4 of the Florida Constitution does not require payment of LFOs as a condition for voting rights restoration. To the contrary, the plain text of the provision requires only that returning citizens complete their term of incarceration and supervision.

Article VI, § 4 provides that "disqualification from voting rights from a felony conviction shall terminate and voting rights be restored upon completion of all terms of sentence including parole or probation." Art. VI, § 4(a), Fla. Const. The provision does not mention payment of LFOs, and the Court may not judicially write those words into the provision. *See, e.g.*, *Lawnwood*, 990 So. 2d at 512. The Governor asks this Court to construe the provision as reaching LFOs because the enumerated list in the provision—"parole and probation"—is introduced by the word "including," which suggests a non-exhaustive list. *See Pro-Art Dental*, 986 So. 2d at 1257. But that rule of construction does not permit *any* condition to be read into the provision. Rather, only conditions of the same type as "parole or probation"—*i.e.*, those relating to reduced liberty by way of state or federal supervision—are covered by the provision. *See White*, 226 So. 3d at 784; *Hearns*, 961 So. 2d at 219. Payment of

LFOs is not similar in kind to incarceration, custody, or supervision under conditional release from confinement. The Court should therefore reject the Governor's invitation to add words to the Constitution that the voters did not include and that are dissimilar in kind from the words the voters approved. The plain text of Article VI, § 4 does not require payment of LFOs as a condition for rights restoration.

This conclusion is supported by the background legal context in Florida, including the Florida Rules of Executive Clemency, for example, which govern rights restoration and other clemency appeals. There, eligibility requirements for various grants of clemency require that an individual has "completed all sentences imposed and all conditions of supervision have expired or been completed, including, but not limited to parole, probation, community control, control release, and conditional release." Fla. R. Exec. Clemency. 5(E), 9(A)(1), (9)(A)(3). This expanded list provides an illustration of the types of conditions that can be fairly read as included in "completion of all terms of sentence including probation and parole."

Furthermore, where payment of any LFOs *is* required as a condition of clemency, the Clemency Rules define it as a distinct condition that must be satisfied, in addition to completion of sentence. For example, in addition to completion of sentence, the Rules separately require individuals to pay off their outstanding restitution to be eligible for rights restoration, but payment of other LFOs is not

required. *See id.* R. 5(E), 9. In contrast, the Rules provide that a person is eligible for a full pardon if she completes her sentence and any term of supervision, as defined above, and then separately require both payment of all outstanding restitution and that an individual not have other outstanding legal debt in excess of $1,000. *See id.* at R. 5(A).

Finally, a person may even seek remission of LFOs through the clemency process, for which they are eligible upon completion of sentence as defined above. *Id.* R. 5(C). If completion of sentence is a requirement for LFOs to be remitted, then the payment of LFOs cannot be possibly be required in order for one's sentence to be completed.

B. At most, Article VI, § 4 is ambiguous and plainly susceptible to an interpretation that excludes LFOs.

Certainly, the plain text of Article VI, § 4 does not unambiguously require payment of LFOs, given that it does not even mention LFOs. So at most, the provision may be ambiguous as to what conditions must be satisfied to trigger automatic rights restoration. Indeed, the Governor has admitted as much. In his brief asking the federal district court to abstain from adjudicating the federal constitutional challenges to SB 7066, the Governor noted that a question of state law is "unsettled" if, *inter alia*, it is "'susceptible' to at least one interpretation that avoids a constitutional question" or is "'silent' as to the definition of key terms or 'the legislative history' is 'equivocal.'" State Defs.' Br. in Support of Motion to Dismiss

at 12, *Jones v. DeSantis*, 4:19-cv-00300-RH-MJF (Aug. 2, 2019), Dkt. 97. Noting that "there is no definition of 'all terms of sentence' in the state constitutional text," *id.* at 13, the Governor reasoned that the meaning of Article VI, § 4 was unsettled. Indeed, the Governor acknowledged that his preferred interpretation was not compelled by the text of Article VI, § 4, and that this Court may well conclude that the provision *excludes* payment of LFOs as a condition for rights restoration. *See id.* at 14 (reasoning that this Court could find that the phrase completion of all terms of sentence "*excludes* legal fines, fees, restitution, and other obligations," in which case SB 7066 "would arguably run afoul of state law").

As the Governor concedes, Article VI, § 4 is susceptible to an interpretation that it excludes LFOs. Indeed, SB 7066 itself acknowledged the ambiguity by creating a grace period whereby affected individuals who owed LFOs but who registered to vote following the adoption of Amendment 4 could not be prosecuted for registering while purportedly ineligible. *See* § 104.011(3), Fla. Stat. This reflects the legislature's judgment that returning citizens would have no way to know from the text of Article VI, § 4 that it could be viewed as requiring full payment of LFOs. Likewise, the Florida legislators debated at length *which* LFOs would be required or not required to qualify for voting rights restoration under SB 7066. This reflects their admission that Article VI, § 4 does not have a clear unambiguous set of LFO requirements.

Moreover, just last year Florida enacted legislation aimed at addressing the poor state of its criminal recordkeeping. That bill, SB 1392, was sponsored by Rep. Chris Sprowls—the Speaker-designate of the House of Representatives—who commented on the state of Florida's criminal records from his time as a prosecutor: "We were really flying blind . . . . We didn't have access to the data, because it was in so many different places, it was virtually unusable."[1] In addition to illustrating how it would violate the Due Process Clause to require returning citizens to determine if they have satisfied their outstanding LFOs in order to register to vote, *see infra* Part III.C, the passage of SB 1392 demonstrates that the legislature, like the Clemency Board, views fines and fees as distinct from the sentence. In mandating the type of data to be collected and maintained, the legislature separately enumerated *sentence* length (defined as incarceration and supervision) on the one hand, and fines and fees on the other. *Compare* § 900.05(17)(c), Fla. Stat. (requiring reporting of "*[s]entence* type and length imposed by the court in the current case, reported in years, months, and days, including but not limited to, the total duration of incarceration in a county detention facility or state corrections institution or facility, and conditions of probation or community control supervision") (emphases added) *with id.* § 900.005(17)(e) (requiring reporting of "[t]otal amount of court costs

[1] Issey Lapowsky, *Florida Could Start a Criminal-Justice Data Revolution*, WIRED (Mar. 13, 2018), https://www.wired.com/story/florida-criminal-justice-data-sharing/.

imposed by the court at the disposition of the case"), *and id.* § 900.005(17)(f) (requiring reporting of "[t]otal amount of fines imposed by the court at the disposition of the case").

Other states similarly exclude payment of LFOs from the definition of "completion of sentence." In South Carolina, rights are restored "by service of the sentence, including probation and parole time," after which citizens are eligible despite outstanding LFOs. *See* § 7-5-120(A)(3), S.C. Code; *see also*, S.C. Elec. Comm'n, *South Carolina Voter Registration Information*, https://www.scvotes.org/south-carolina-voter-registration-information ("Any person who is convicted of a felony or an offense against the election laws is not qualified to register or to vote, unless the disqualification has been removed by service of the sentence, or unless sooner pardoned. Service of sentence includes completion of any prison/jail time, probation and parole."); S.C. Elec. Comm'n, *South Carolina Voter Registration Mail Application*, https://www.scvotes.org/files/VR_Blank_Form.pdf ("I have never been convicted of a felony or offense against the election laws OR if previously convicted, I have served my entire sentence, including probation or parole . . . .").

Likewise, in Texas, returning citizens are eligible for rights restoration despite having outstanding LFOs if they have "fully discharged [their] sentence, including any term of incarceration, parole, or supervision, or completed a period of probation

ordered by any court." § 11.002, Tex. Elec. Code Ann.; *see also*, Texas Sec'y of State, *Effect of Felony Conviction on Voter Registration*, https://www.sos.state.tx.us/elections/laws/effects.shtml ("Pursuant to Section 11.002 of the Texas Election Code (the "Code"), once a felon has successfully completed his or her punishment, including any term of incarceration, parole, supervision, period of probation, or has been pardoned, then that person is immediately eligible to register to vote.").

In North Carolina, voting rights are automatically restored upon discharge of incarceration, probation, or parole, § 13-1, N.C. Gen. Stat., which official materials refer to as "completion of all terms of [] sentence." *See* N.C. State Bd. of Elections & Ethics Enforcement, *N.C. Voting Rights Guide*, https://www.ncsbe.gov/Portals/0/Documents/VotingRightsGuide_CriminalJusticeSystem.pdf (stating that you cannot vote or register "until you have **completed all the terms** of your felony sentence, including any probation or parole."); N.C. State Bd. of Elecs. & Ethics Enforcement, "N.C. Voting Rights Guide, People in the Criminal Justice System," https://www.ncsbe.gov/Portals/0/Documents/VotingRightsGuide_CriminalJusticeSystem.pdf ("You must not be serving an active felony sentence, including any probation or parole.").

In Alabama, payment of LFOs is required for rights restoration, but is enumerated separately from completion of prison, probation, and parole. *See* § 15-

22-36-.1(3)-(4), Ala. Code. There, the term "completion of sentence" is used to mean time served. *See id*. Similarly, in Tennessee the requirement that returning citizens complete any term of incarceration, probation, and parole, is enumerated separately from the requirement that they pay restitution, court costs, and child support. *See* § 40-29-202, Tenn. Code Ann.

Like these states, the plain text of Article VI, § 4 excludes LFOs as a condition for rights restoration. But, even if this Court concluded otherwise, at most the provision is ambiguous as to its scope—as the Governor has conceded—and the Court must ascertain the intent of the voters, guided by the principle of constitutional avoidance. As explained below, the voters intended for rights restoration to be automatic upon the completion of incarceration and supervision—a reading of Article VI, § 4 that must be adopted in order to avoid creating serious constitutional concerns regarding the provision.

III. The Court should decline to read an implicit LFO requirement into Article VI, § 4 because doing so would raise serious constitutional concerns.

The Court should decline to adopt the reading of Article VI, § 4 advocated by the Governor and Secretary of State on constitutional avoidance grounds. For at least a century, this Court has repeatedly held that Florida courts have a duty to construe statutes "if fairly possible, as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *In re Seven Barrels of Wine*,

83 So. 627, 632 (Fla. 1920). Indeed, it is a "settled principle that '[w]hen two constructions of a [provision] are possible, one of which is of questionable constitutionality, the [provision] *must* be construed so as to avoid any violation of the constitution.'" *State v. Presidential Women's Ctr.,* 937 So. 2d 114, 116 (Fla. 2006) (quoting *Indus. Fire & Cas. Ins. Co. v. Kwechin,* 447 So. 2d 1337, 1339 (Fla.1983)) (emphasis added); *see also State v. Giorgetti*, 868 So. 2d 512, 518 (Fla. 2004) ("We are also obligated to construe [laws] in a manner that avoids a holding that a [law] may be unconstitutional."). In other words, this rule of construction requires courts to avoid not only certain constitutional violations but also "to avoid any potential constitutional quandaries." *Id.*[2] And, as discussed *infra* Part IV, in following this rule of construction, the Court would also be deferring on the side of voters, always a safe place to be in a democracy.

[2] This Court should apply this canon of construction even though the Court does not have jurisdiction to *decide* the federal constitutional questions in this advisory opinion proceeding. *See* art. IV, § 1(c), Fla. Const. (granting Court authority to advise Governor regarding "the interpretation of any part of *this* constitution" related to the Governor's executive powers and duties) (emphasis added); *see also Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 738 (Fla. 1961) ("We are not here concerned, of course, with the constitutionality vel non of § 95.03 . . . since this question is not before us. . . . [W]e have considered the question of the applicability of the statute to the subject contract in the light of the well settled rule of statutory construction that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." (internal quotation marks omitted)).

As discussed above, the Governor has acknowledged there are several fairly possible interpretations of Article VI, § 4, including one that excludes an LFO requirement. Because the inclusion of an LFO requirement in Article VI, § 4 creates, at the very least, a "constitutional quandar[y]," *id.*—as illustrated by the ongoing federal challenges to SB 7066's LFO requirement and as discussed below—this Court should construe Article VI, § 4 to avoid those grave constitutional concerns. This Court need not resolve these federal constitutional questions—which are currently pending in federal court and not within the scope of this Court's advisory opinion jurisdiction, *see supra* note 2—to address the narrow question before it, and indeed the Governor has asked that they be excluded from this Court's review pending the ongoing federal litigation, *see* Request for Advisory Op. at 4 ("I do not ask this Court to address any issues regarding chapter 2019-162, Laws of Florida or the United States Constitution"). But the Court need not ignore them either. The mere presence of serious federal constitutional concerns is a reason to adopt a plausible interpretation of Article VI, § 4 that avoids those concerns.

A. Federal courts are likely to strike down any LFO payment requirement as a poll tax.

Interpreting Article VI, § 4 to require payment of LFOs would contravene the direct prohibition on laws "den[ying] or abridg[ing]" the right to vote "by reason of failure to pay any poll tax or other tax" of the Twenty-Fourth Amendment to the U.S. Constitution. Amend. XXIV, U.S. Const. Embedding in the Florida

Constitution a requirement that people with past convictions pay a plethora of fines and fees in order to access the ballot would run afoul of this blanket prohibition on monetary restrictions on access to the electoral process. It is undeniable that reading an LFO requirement into Article VI, § 4 would lead to a circumstance where those who pay the State are eligible to vote and those who do not pay the State are not eligible to vote. That alone should end the inquiry.

First, an LFO requirement for voting rights restoration would "deny or abridge" the right to vote for many Floridians. In the current federal challenge to SB 7066, the Governor contends that an LFO requirement does not constitute a "poll tax" because it "does not deny or abridge any rights; it only restores them." State Defs.' Opp. to Mot. for Prelim. Inj. at 21, *Jones v. DeSantis*, No. 4:19-cv-00300 (N.D. Fla. Sept. 6, 2019), Dkt. 132 (quoting *Johnson v. Bredesen,* 624 F.3d 742 (6th Cir. 2010)). In other words, the Governor argues that the State can impose a tax on voting rights restoration without running afoul of the U.S. Constitution because people with felony convictions lawfully lost their right to vote in the first instance. But this argument misunderstands the Twenty-Fourth Amendment, which does not dictate who must be eligible to vote in the first instance, but instead prohibits financial conditions on access to the right to vote.

The lawful disenfranchisement of people with felony convictions under *Richardson v. Ramirez*, 418 U.S. 24 (1974), does not create a constitution-free zone

for doling out restoration of 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. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[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."); *see also Bush v. Gore*, 531 U.S. 98, 104-05 (2000). The Supreme Court's decision upholding felony disenfranchisement in *Richardson* simply held that criminal convictions are a permissible factor, like residency or citizenship, for states to consider in establishing qualifications for the franchise. 418 U.S. at 53 (quoting *Lassiter v. Northhampton Cty. Bd. of Elections*, 360 U.S. 45, 51 (1959), for the proposition that "[r]esidence requirements, age, previous criminal record . . . are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters" (internal quotation marks omitted)). It did not, as the Governor contends, withdraw an entire class of people from any constitutional protection in their access to the right to vote.

A few hypotheticals make this proposition obvious. Seventeen-year-olds can lawfully be excluded from voting just as people with convictions can. But a law that allowed 17-year-olds to vote only if they paid all outstanding parking tickets would run afoul of the Twenty-Fourth Amendment. Likewise, non-domiciled residents can

lawfully be excluded from voting. But a law allowing temporary visitors to vote only if they paid a tourism tax would run afoul of the Twenty-Fourth Amendment. Thus, even though Florida can lawfully exclude people with past felony convictions from the ballot, it cannot allow people with convictions to vote only if they pay for that privilege.

Richardson itself makes clear that a felony disenfranchisement scheme is still subject to constitutional scrutiny if it runs afoul of other constitutional prohibitions. 418 U.S. at 56 (remanding the question of whether the "total lack of uniformity in county election officials' enforcement of the challenged [felony disenfranchisement] laws as to work a separate denial of equal protection"). *Hunter v. Underwood*, which struck down a racially discriminatory criminal disenfranchisement scheme, underscores that principle. 471 U.S. 222, 233 (1985); *see also Hobson v. Pow,* 434 F. Supp. 362, 266-67 (N.D. Ala. 1977) (striking down gender discriminatory criminal disenfranchisement scheme).

In *Shepherd v. Trevino*, the Fifth Circuit rejected the Governor's argument that Florida's felony disenfranchisement scheme is not subject to constitutional scrutiny for impermissible restrictions: "[W]e are similarly unable to accept the proposition that section 2 removes all equal protection considerations from state-created classifications denying the right to vote to some felons while granting it to others. No one would contend that section 2 permits a state to disenfranchise all

felons and then reenfranchise only those who are, say, white." 575 F.2d 1110, 1114 (5th Cir. 1978).[3] Much as the Fourteenth Amendment's Equal Protection Clause would not permit a law allowing for the re-enfranchisement only of white felons, and much as the Twenty-Sixth Amendment would presumably not permit a state to re-enfranchise only felons over the age of thirty, a law allowing for the re-enfranchisement of only those felons who can pay a "poll tax or other tax" is prohibited by the Twenty-Fourth Amendment.

Second, an LFO requirement would qualify as a "poll tax or other tax" under the Twenty-Fourth Amendment. The Twenty-Fourth Amendment cannot be evaded merely by shifting the financial condition on voting away from the poll booth. The Supreme Court has held that the Twenty-Fourth Amendment's expansive language is intended to "nullif[y] sophisticated as well as simple minded modes" of taxing prospective voters and extends to "equivalent or milder substitute[s]" to a general poll tax. *Harman v. Forssenius*, 380 U.S. 528, 540–41 (1965).

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. The legal definition of "tax" at the time of the Twenty-Fourth Amendment's debate and ratification was "a

[3] *Shepherd v. Trevino* was decided before the split of the Fifth Circuit and is therefore binding precedent in the Eleventh Circuit.

pecuniary contribution . . . for the support of a government." Black's Law Dictionary 28 (4th ed. 1951); *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"). Any requirement read into Article VI, § 4 requiring the payment of court-imposed fines and fees would meet this simple definition. The court-imposed fines and fees levied against criminal defendants go to the State for the support of the court system itself, as well as for general support to the State. *See* art. V, § 14, Fla. Const.; *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.").

Thus, any LFO requirement read into Article VI, § 4 would withhold the right to vote from any individual that fails to pay fines and fees that fall within the definition of "other tax." Such a scheme would violate the Twenty-Fourth Amendment. The Court can avoid this grave constitutional doubt by declining to read an LFO requirement into Article VI, § 4.

B. The inclusion of an LFO requirement in Article VI, § 4, without safeguards, would unconstitutionally discriminate based on wealth.

Even putting aside the U.S. Constitution's direct prohibition on poll taxes, an LFO requirement—particularly an LFO requirement with no safeguards for those *unable* rather than unwilling to pay—would violate the Fourteenth Amendment. In

practice, an LFO requirement would create two classes of individuals—those who can vote because they can pay the required LFOs and those who cannot.

This scheme would contravene the Supreme Court's directive that "wealth or fee paying has . . . no relation to voting qualifications." *Harper,* 383 U.S. at 670 (striking down a $1.50 poll tax). Even if the State has rational reasons for seeking the payment of LFOs—it does (just as the State undeniably would have an interest in collecting poll taxes to fund the electoral system)—the Supreme Court has held that restrictions on access to the right to vote must be related to voter qualifications, not some other goal of the State. *See Crawford v. Marion Cty. Election Bd*., 553 U.S. 181, 189 (2008) (plurality opinion) ("[U]nder the standard applied in *Harper,* even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications."). In short, "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Harper,* 383 U.S. at 666.

The Florida criminal justice system does not relieve individuals who are unable to pay their LFOs. To the contrary, the vast majority of court-imposed fines and fees are mandatory and imposed regardless of ability to pay. *See* Fla. Court Clerks & Comptrollers, 2018 Annual Assessments and Collections Report, Statewide Summary – Circuit Criminal at 10 (2018), https://flccoc.org/wp-content/uploads/2018/12/2018-Annual-Assessments-and-Collections-Report.pdf.

Drug convictions, for example, can lead to mandatory fines up to $750,000. *See* § 893.135(1), Fla. Stat. Over $110 million was assessed in drug trafficking cases in the 2017-2018 fiscal year alone. 2018 Annual Assessments and Collections Report at 11.

Many people with past convictions cannot afford to pay these fines and fees. The Florida Circuit Criminal Courts in 2018 reported that the collections rate for fines and fees was just 20.55%. *Id.* Over 85% of all felony-related fines and fees in Florida are categorized as at risk—meaning the courts have "minimal collections expectations" due to the defendant's lack of financial resources. *Id.* Of all felony-related LFOs, 22.9% are labeled at risk (*i.e.*, "minimal collections expectations") specifically because the defendant was indigent. *Id.*

As a result, reading an LFO requirement into Article VI, § 4—particularly absent legislative implementation providing an exception for those unable to pay—would make affluence an electoral standard in violation of *Harper*'s command. While the Governor has argued elsewhere that *Harper* should not apply because this scheme would apply only to those with past felony convictions, *see* State Defs.' Br. in Opposition to Preliminary Injunction at 22, *Jones v. DeSantis*, No. 4:19-cv-00300, (N.D. Fla. Aug. 2, 2019), Dkt. 132, for the reasons discussed above, that argument misses the mark. The question of whether the State can lawfully strip people with felony convictions of the right to vote—it can under *Richardson v. Ramirez*—does

not answer the question of whether the State can dole out the right to vote to this population based on wealth—it cannot. Indeed, in the specific context of voter restoration, the Eleventh Circuit sitting *en banc* has affirmed that "access to the franchise cannot be made to depend on an individual's financial resources." *Johnson v. Gov. of Fla.*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005) (en banc) (citing *Harper* and observing that "access to the restoration of the franchise" cannot be "based on ability to pay"); *see also Thompson v. Alabama*, 293 F. Supp. 3d 1313, 1332 (M.D. Ala. 2017) (denying motion to dismiss Fourteenth Amendment challenge to LFO requirement for voting rights restoration); *Bynum v. Conn. Comm'n on Forfeited Rights*, 410 F.2d 173, 175 (2d Cir. 1969) (applying *Harper* in the voting rights restoration context).

But even if *Harper* itself does not apply because of the affected population's past convictions—it does—the Supreme Court's broader jurisprudence on wealth discrimination would similarly bar an LFO requirement absent adequate safeguards for the indigent. The Supreme Court has repeatedly held that it violates basic constitutional principles of equal protection and due process to withhold a substantial benefit from those who cannot afford to pay LFOs—additional punishment not imposed on those who can pay. This line of U.S. Supreme Court cases does not apply only to fundamental rights, and thus applies regardless of whether the right to vote is deemed "fundamental" for those with past convictions.

See, e.g., Griffin v. Illinois, 351 U.S. 12, 18 (1956) (granting indigent appellants the right to trial transcripts) (holding that 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"); *Bearden v. Georgia*, 461 U.S. 660, 671 (1983) (holding that revocation of probation because of inability to pay violates the Constitution even though there is no fundamental right to probation).

To determine whether wealth-based discrimination violates the Fourteenth Amendment, courts evaluate, among other factors, whether individuals "because of their impecunity were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973). "[H]eightened scrutiny" applies "where [these] two conditions are met[.]" *O'Donnell v. Harris Cty.,* 892 F.3d 147, 162 (5th Cir. 2018); *see also Bearden*, 461 U.S. at 665-66 (evaluating four "factors" relevant to whether wealth-based punishment is unconstitutional and rejecting "pigeonhole analysis" that would automatically apply "rational basis" review"). An LFO requirement read into Article VI, § 4 would fail this test: it would completely deny access to restoration of voting rights—an undeniably important "benefit"—to individuals who are unable to pay their LFOs.

An LFO requirement read into Article VI, § 4—particularly without legislative safeguards—would similarly fail the four-factor test the Supreme Court has laid out in *Bearden* for wealth-discrimination claims: (1) "the nature of the individual interest affected," (2) "the extent to which it is affected," (3) "the rationality of the connection between legislative means and purpose," and (4) "the existence of alternative means for effectuating the purpose." 461 U.S. at 666-67 (quotation marks omitted). The nature of the interest—access to the franchise—is paramount. *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) ("There is no right more basic in our democracy than the right to participate in electing our political leaders."). And the interest of Floridians' with prior felony convictions in voting would be affected to the fullest possible extent; it would be completely denied.

With respect to the "rationality of the connection between legislative means and purpose," *Bearden*, 461 U.S. at 666-67, imposing prolonged disenfranchisement on people unable to pay does not "aid[] collection of the revenue." *Tate v. Short*, 401 U.S. 395, 399 (1971); *see also Bearden*, 461 U.S. at 670 ("Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming."); *Zablocki v. Redhail*, 434 U.S. 347, 389 (1978) ("[W]ith respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married, without delivering any money at all into the hands of the applicant's prior children.").

Likewise, when an individual is *unable* rather than unwilling to pay, the failure to pay LFOs is not correlated to rehabilitation or any other factor that might reasonably relate to voting. *See Bearden*, 461 U.S. at 671 (rejecting the State's rehabilitation rationale for revoking probation for failure to pay LFOs).

Finally, absent an LFO requirement in Article VI, § 4, the State would retain all the ordinary means of collecting its debt. Undoubtedly, those means are likely more effective than withholding the right to vote until payments are made. But the State cannot constitutionally predicate the right to vote on payment of debts that it could not, for example, enforce through criminal contempt. Such a method of debt collection—beyond being unproductive—would be unduly harsh and discriminatory. *See James v. Strange*, 407 U.S. 128, 138 (1972) (striking down a recoupment statute that denied debtors the protections provided for indigent debtors in the civil judgment context) ("[A] State may not impose unduly harsh or discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor.").

In sum, Florida voters were not obligated to adopt Amendment 4, amending Article VI, § 4 to grant rights restoration. But having done so, that provision cannot and should not be interpreted to deny access to the franchise solely based on a person's inability to pay. "[O]nce a State affords that right, . . . the State may not

'bolt the door to equal justice'" based on ability to pay. *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956)).

C. The inclusion of an LFO requirement in Article VI, § 4 would create serious due process concerns.

Interpreting Article VI, § 4 to include an LFO requirement would create serious due process concerns under the Fourteenth Amendment. Without significant legislative clarification and implementation (which SB 7066 does not provide), the inclusion of an LFO requirement in Article VI, § 4 would lead to serious uncertainty as to the basic question of voter eligibility for hundreds of thousands of Floridians and a high risk of erroneous deprivation of the right to vote.

Even if this Court were to somehow find an implicit LFO requirement in Article VI, § 4, the Court would not have resolved the question of *which* LFOs are required. The types of financial obligations that accompany criminal convictions are myriad. They include, *inter alia,* statutory fines, restitution, court costs, surcharges, forced contributions to various state funds, public defender application and representation fees, parole and probation fees, debts due as a result of health care while incarcerated, and the cost of DNA and blood samples. *See generally* ch. 983, Fla. Stat.; § 948.03, Fla. Stat. An LFO requirement, even if it existed, would have to delineate between LFOs that are disqualifying and those that are not disqualifying

in order to enable Floridians to determine their eligibility to vote—something the Due Process Clause requires.[4]

As noted above, the legislature has recognized that the current state of criminal data in Florida is poor. *See supra* at 13. And while the legislature has acted to improve that data starting in 2021, *see* ch. 2018-127, Fla. Laws, those improvements are yet to be seen, will not help hundreds of thousands of Floridians with past convictions, and cannot improve the available data for out-of-state and federal convictions.

As of today, there is no accessible or reliable source of information in Florida—either at the state or county level—for determining all LFOs imposed related to a felony conviction, whether those LFOs were included within the

[4] The legislature attempted to do this in SB 7066 by indicating that only LFOs included "within the four corners of the sentencing document" are disqualifying and excluding "fines, fees, or costs that accrue after the date the obligation is ordered as a part of the sentence" as non-disqualifying. § 98.0751, Fla. Stat. However, SB 7066 did not define "the sentencing document" and the language excluding LFOs that "accrue after the date the obligation is ordered" conflicts with the statute's express inclusion of fines or fees that are imposed as conditions of parole or probation—many of which do accrue after the date of sentencing. *Id.* Counsel for the plaintiffs in the ongoing federal case have deposed several state and local election officials, none of whom to date can explain which LFOs are disqualifying and which are non-disqualifying. They have furthermore obtained testimony that dispositional paperwork, in general, varies across courts and counties, including in the manner in which financial assessments are recorded, such that there is no uniform way to determine which LFOs are disqualifying under SB 7066. *See, e.g.*, Decl. of Carlos Martinez at 1-2, (attached hereto as Appendix A).

"sentence," or whether those LFOs have been paid or, if not, the amount outstanding. *See* Video: Apr. 23, 2019, House Floor Hearing at 6:02:20–6:03:10,[5] (hereinafter "Apr. 23 House Hearing") (Representative Grant: "the State of Florida nowhere keeps a discrete data element that documents" all payment of LFOs); Video: Feb. 14, 2019, Jnt. House Meeting of the Criminal J. Subcomm. & the Judiciary Comm. at 1:18:00–1:18:36,[6] (noting that there are "enormous gaps" in data because the FDOC "has no way of knowing" what happens to outstanding LFOs after termination of supervision); *id.* (Chief Judge Frederick J. Lauten testifying: "If I order to someone to pay restitution as a condition of probation . . . then the Probation Department keeps those records. The clerk may or may not have that evidence. And so, if the Supervisor contacted the Clerk, the Clerk might go, 'I don't know, contact DOC.'") (emphasis added); *id.* at 29:56–31:42, 54:18–54:34 (Martin County Clerk of Court Carolyn Timmann testifying that the biggest limitation on data regarding returning citizens is restitution, noting: "in some cases we have restitution information, but in the majority we do not," particularly in cases where individuals pay restitution directly to victims, without receipts or documentation of payments); Dep. of Osceola County Supervisor of Elections at 125:10–19, *Jones v. DeSantis*,

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[5] https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2019041264.

[6] https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2019021160.

No. 4:19-cv-00300, (N.D. Fl. Aug. 2, 2019), Dkt. 98-24 ("And an example would be . . . that when you pull the clerk of court record, there is something there about fines and fees. But it doesn't tell you if they've been paid. One of our staff members tried to call the clerk of the court . . . [and t]hey were told that it had been turned over to a collection agency. And they had no knowledge if it was paid—if it had been paid.").

In sum, if this Court announces a new LFO requirement as part of Article VI, § 4, there will be no publicly available sources that the Department of State, local election officials, and returning citizens could reasonably rely on to determine whether a citizen has paid all LFOs for felony convictions or how much a citizen must pay to become eligible to vote under such an interpretation of Article VI, § 4. The legislature recognized these obstacles to a functional LFO requirement for voting by including a "Restoration of Voting Rights Work Group" tasked with, among other things, developing recommendations for the legislature related to "consolidation of all relevant data" needed to implement the law and inform individuals regarding eligibility. Ch. 2019-62, § 33, Fla. Laws. The Work Group has not yet identified mechanisms for implementing an LFO requirement for voting, and this Court should refrain from legislating when the legislature itself has not done so.

Given the foregoing, the imposition of an LFO requirement as part of Article VI, § 4 would create substantial due process problems. At the front end, *eligible*

voters would be routinely deprived of the right to vote simply because they cannot determine their eligibility and thus cannot affirm their eligibility as required in order to register to vote. § 97.051, Fla. Stat.; *see also United States v. Dumas*, 94 F.3d 286, 291 n.3 (7th Cir. 1996) ("[T]he validity of a law with which it is impossible to comply may be questioned.").

There is *no* mechanism for Floridians unsure of their eligibility to seek a determination of voter eligibility by the State, and thus the affirmation of eligibility required on the voter registration form would serve as an absolute bar for many Floridians. These voter applicants are entitled to due process before their right to register to vote is denied just as voter registrants are entitled to due process before they are removed from the registration list. *E.g., Willner v. Committee on Character & Fitness,* 373 U.S. 96, 102 (1963) ("[T]he requirements of due process must be met before a State can exclude a person from practicing law."); *Schware v. Bd. of Bar Examiners,* 353 U.S. 232, 239 (1957) (under the Due Process Clause, "officers of a state cannot exclude [a bar] applicant when there is no basis for their finding that he fails to meet [its admission] standards"); *Goldsmith v. U.S. Bd. of Tax Appeals,* 270 U.S. 117, 123 (1926) (applicant for admission to practice before Board of Tax Appeals entitled to notice and hearing); *Haitian Refugee Ctr., Inc. v. Nelson,* 872 F.2d 1555, 1562 (11th Cir. 1989) (finding an entitlement interest exists in the right to apply for Special Agricultural Worker status).

And for eligible registered voters, the lack of reliable data will undoubtedly lead to the routine removal of voters based on outdating, erroneous, or incomplete information. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (risk of "erroneous deprivation" is a key factor in procedural due process analysis).

Meanwhile, the State's inability to conduct accurate list maintenance related to this LFO requirement would leave many ineligible voters on the registration rolls and at risk of criminal prosecution. These registered individuals would have no reliable means to ascertain whether voting would violate the law or not. The Supreme Court has repeatedly held that the State cannot threaten criminal sanctions if a reasonable person cannot determine whether their actions would violate the law. *See Giaccio v. State of Pa*., 382 U.S. 399, 402 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits[.]"); *Watkins v. United States*, 354 U.S. 178, 209-15 (1957) (invalidating conviction because application of the law necessitated reference to sources of factual information that "leave the matter in grave doubt"); *Int'l Harvester Co. of Am. v. Commonwealth of Ky.,* 234 U.S. 216, 221 (1914) (invalidating conviction based on Kentucky courts' construction of several statutes together because the construction provided a standard premised on an unknowable fact: "the market value . . . under normal market conditions").

Given the lack of available data and lack of clarity among the myriad LFOs that *could* be disqualifying, if this Court reads an LFO requirement into Article IV, § 4, procedural due process problems will proliferate.

IV. Requiring returning citizens to pay outstanding LFOs as a condition of rights restoration would contradict the will of the voters.

Requiring returning citizens to pay outstanding LFOs as a condition for rights restoration would contradict the will of the voters. It is the duty of this court "to discern and effectuate the intent and objective of the people" in construing Article VI, § 4. *Plante*, 372 So. 2d at 936. Indeed, "[t]he touchstone for determining the meaning of a constitutional amendment adopted by initiative is the intent of the voters who adopted it." *Advisory Op. to Governor—1996 Amendment 5 (Everglades)*, 706 So. 2d. 278, 282 (Fla. 1997). In interpreting constitutional provisions, the court must keep in mind "the objective to be accomplished and the evils to be remedied." *Plante*, 372 So. 2d at 936. And in so doing, it may rely on historical precedent, present facts, common sense, and "the explanatory materials available to the people as a predicate for their decision." *Id.*

In amending Article VI, § 4, voters replaced Florida's previous system for rights restoration—which involved interminable delay, and under which civil rights were restored only rarely and on an entirely arbitrary basis—with automatic rights restoration for all individuals with past felony convictions, other than those convicted of murder or felony sexual offenses. Requiring these same returning

citizens to pay off their LFOs before their rights are restored would substitute one arbitrary and interminable system for another. The history, context, and narrative around the adoption of Amendment 4 makes clear that voters' intent was to dismantle existing barriers to rights restoration—not to erect new ones. Thus, the Court should decline to read an LFO requirement into the text of Article VI, § 4 as amended.

A. Florida voters enacted Article VI, § 4 to remedy the evils of the state's harsh felony disenfranchisement law and its narrow, arbitrary, and interminable rights restoration process.

Prior to voters' amendment of Article VI, § 4 in 2018, Florida had one of the harshest felony disenfranchisement regimes in the country. It was one of three states that permanently disenfranchised its citizens on the basis of a single felony conviction. *See* Br. for the Sentencing Project as *Amicus Curiae* ("Sentencing Project Br."), *Hand v. Scott*, No. 18-11388, 2018 WL 3329534, at *5 (11th Cir. June 28, 2018). Over 1.6 million Floridians were permanently disenfranchised under this scheme—more than twenty-five percent of the approximately 6.1 million United States citizens disenfranchised nationwide. *Id.* at 14-16. Over ten percent of Florida's voting age population was disenfranchised as a result—a larger percentage of its adult citizens than in any other state in the United States. *Id.*

Under the previous scheme, the only avenue for the restoration of voting rights was to seek clemency from the Executive Clemency Board, comprised of the

Governor and members of the Cabinet. *See* art. IVb § 8(a), Fla. Const. (1968). Every decision on executive clemency is subject to the "unfettered discretion" of the Governor, who has the authority "to deny clemency at any time, for any reason." Fla. R. Exec. Clemency 4. Anecdotal evidence suggests that this unfettered discretion has been, at times, employed to deny rights restoration to applicants who profess different political beliefs than the then-Governor or members of the Board, and to those who are critical of the clemency process. *See Hand v. Scott*, 285 F. Supp. 3d 1289, 1302 (N.D. Fla. 2018) (appeal filed Apr. 5, 2018).[7]

Depending on their crime of conviction, individuals who have completed all sentences imposed and all conditions of supervision must wait five years before they are eligible to apply for rights restoration. Fla. R. Exec. Clemency 9. Individuals convicted of a series of enumerated crimes must wait seven years after completion of all sentences and all conditions of supervision before they are eligible. *Id.* R. 5(E). As discussed *supra* Part II.A, payment of LFOs is not included in the definition of completion of sentence for purposes of clemency, though payment of restitution is a separately enumerated requirement for rights restoration and pardons, and payment

[7] Although the Eleventh Circuit granted the state's application for a stay pending appeal, the panel did not dispute this evidence, it merely found that such anecdotal evidence was irrelevant to the plaintiffs' facial attack on the grant of unfettered discretion to the Governor. *See Hand v. Scott*, 888 F. 3d 1206, 1210-11 (11th Cir. 2018).

of outstanding LFOs in excess of $1,000 is a separately enumerated requirement for pardons.

Even after an individual becomes eligible, they may wait years before their application is processed and decided. *See Hand*, 285 F. Supp. at 1305 (finding that "the Board may defer restoration of rights for years—or forever."). And if their application is denied, the Governor may unilaterally extend the period during which they must wait to reapply beyond the minimum two years set out in rule, including by extending such a period indefinitely. *See Hand*, 285 F. Supp. at 1305; *see also* Fla. R. Exec. Clemency 4 (allowing the Governor to deny clemency "at any time, for any reason."). Success under this system is exceedingly rare. Since 2011, fewer than 3,000 individuals have had their rights restored through executive clemency. *Hand*, 285 F. Supp. at 1310.

In amending Article VI, § 4, voters sought to remedy the various evils of the existing rights restoration process—its arbitrariness, inscrutability, interminability, and infrequent success. *See Plante*, 372 So. 2d at 936. As such, voters approved a streamlined process for rights restoration for all returning citizens, other than those convicted of murder or a felony sexual offense, by terminating their disqualification from voting automatically upon completion of sentence. In so doing, voters' objective was to eliminate the arbitrary and never-ending obstacles preventing the vast majority of returning citizens from obtaining rights restoration, and to provide

a simple, clear, and consistent process for rights restoration by automatically re-enfranchising returning citizens.

Whatever this Court's views on the wisdom of voters' objective, it must interpret the Article VI, § 4 in such a manner as to effectuate its intent. *See Plante*, 372 So. 2d at 936. And, it is clear that voters intended to eliminate barriers to rights restoration for individuals convicted of crimes, other than murder or felony sexual offense, by broadening access, eliminating delay, and providing a clear and automatic procedure for rights restoration.

B. Interpreting Article VI, § 4 to require payment of LFOs would contradict the will of Florida voters by substituting one arbitrary, inscrutable, and interminable process for another, and by severely restricting the number of voters eligible for rights restoration.

Interpreting Article VI, § 4 to require payment of LFOs would, contrary to voters' intent, substantially restrict the number of returning citizens eligible for right restoration, delay and obfuscate eligibility, and subject them to arbitrary distinctions and procedures. At best, an LFO requirement would once again subject these returning citizens to substantial delays. At worst, it would deny returning citizens any opportunity for rights restoration. For examples, the Court need look no further than the individuals filing this brief, who are plaintiffs in the federal lawsuit.

Diane Sherrill owes $2,279 in outstanding LFOs related to her non-disqualifying felony convictions. *See* Sherrill Decl. ¶ 15, *Jones v. DeSantis*, No. 4:19-cv-00300 (N.D. Fla. Aug. 02, 2019), Dkt. 98-17. Ms. Sherrill is indigent, living

on a fixed income, and cannot afford to pay any amount towards her LFOs at this time. *Id.* ¶¶ 6, 15. Nor does she foresee a time when she will ever be able to pay her LFOs in full. *Id.* ¶ 15.

As a result, an LFO requirement would result in permanent disenfranchisement for Ms. Sherrill, unless she were able to successfully navigate the arbitrary and interminable clemency process. Due to the nature of that process, there is no guarantee that Ms. Sherrill would ever have her rights restored. This is the precise evil that voters sought to eliminate for returning citizens, like Ms. Sherrill, with non-disqualifying convictions. Such a construction would defeat the purpose and is "incongruous with the will of the people." *Plante*, 372 So. 2d. at 937.

Bonnie Raysor has $4,260 in outstanding LFOs related to her non-disqualifying felony convictions. *See* Raysor Decl. ¶ 7, *Jones v. DeSantis*, No. 4:19-cv-00300 (N.D. Fla. Aug. 02, 2019), Dkt. 98-16. Based on her current ability to pay, Ms. Raysor is on a payment plan with the court under which she pays $30 per month towards her outstanding balance. *Id.* ¶ 8. Under this plan, she will not pay off her LFOs until 2031. *Id.*

As such, an LFO requirement would delay the restoration of Ms. Raysor's rights for nearly twelve years, at which point she will be seventy years old. *Id*. In the interim, it would leave Ms. Raysor in precisely the same position she was in before Article VI, § 4 was amended. She could apply for clemency, but the restoration of

her rights would be subject to the same delayed, arbitrary and opaque decision-making, that voters sought to eliminate for returning citizens like Ms. Raysor.

No reasonable voter would have understood the amended provision—intended to streamline and clarify the rights restoration process—as enacting *new* hurdles for returning citizens to face in obtaining rights restoration, a more restrictive definition of completion of sentence than exists under the clemency scheme, or an obscure eligibility requirement not otherwise identified in its text. *See Millender*, 666 So. 2d. at 886 (declining to find that voters would have inferred a complicated and technical definition of a term, which would be contrary to common sense understanding, and was not spelled out in the text).[8] Nor would voters reasonably expect the amended provision to leave the vast majority of returning citizens at the mercy of the exact system it was intended to replace. This would be "an absurd result, totally incongruous with the will of the people" and should not be adopted. *Plante*, 372 So. 2d at 937. Yet, that is precisely what an LFO requirement would do.

[8] *Millender* dealt with a constitutional provision regulating trawl fishing in nearshore and inshore waters. 666. So. 2d at 884. The court was asked to determine the method of measuring the maximum length of a mesh net intended to be adopted by voters for the purposes of determining whether a trawl fishing net contains "no more than 500 square feet of mesh area." *Id*. The court declined to adopt a method of calculation that would sweep in nets containing less than 500 square feet of raw stock, finding that to do so would conflict with voters' most likely understanding of the provision, and noting that if a more complicated and detailed measurement method were intended "it would have been more clearly spelled out in the amendment." *Id*

Contemporaneous evidence demonstrates that voters would have expected re-enfranchisement to apply broadly. It was widely reported that Amendment 4 would re-enfranchise approximately 1.5 million Floridians.[9] Indeed, many reports indicated

[9] *See, e.g.*, Emily Bazelon, *Will Florida's Ex-Felons Finally Regain the Right to Vote?*, N.Y. Times Magazine (Sept. 26, 2018), https://www.nytimes.com/2018/09/26/magazine/ex-felons-voting-rights-florida.html?auth=login-email&login=email ("A referendum on the November ballot in Florida would re-enfranchise 1.5 million citizens — and could change the state's electorate."); Kirby Wilson, *John Legend joins Amendment 4 advocates in Orlando to push for felon rights' restoration*, Tampa Bay Times (Oct. 4, 2018) https://www.tampabay.com/florida-politics/buzz/2018/10/03/john-legend-joins-amendment-4-advocates-in-orlando-let-my-people-vote/ ("If Amendment 4 passes, well over one million non-violent offenders . . . will have their voting rights restored."); A.G. Gancarski, *Catholic Bishops back felons' rights restoration Amendment 4*, Florida Politics (Oct. 18, 2018), https://floridapolitics.com/archives/278088-catholic-amendment-4 ("If Amendment 4 were to pass, 1.4 million reformed Florida felons (one in ten potential voters) would have their rights restored."); Alex Toth, *Florida Amendment 4: What it means for voting rights*, UNF Spinnaker (Oct. 23, 2018), https://unfspinnaker.com/72243/news/florida-amendment-4-what-it-means-for-voting-rights/ ("Over 1.5 million Floridian citizens are unable to vote in the upcoming midterms, or any subsequent elections, due to previous felony convictions. . . . Amendment 4 . . . could change that."); Jeff Powers, *Florida's Amendment 4: Arguably The Most Important Initiative Few Are Watching*, Independent Voter News (Oct. 24, 2018), https://ivn.us/2018/10/24/floridas-amendment-4-arguably-the-most-important-initiative-few-are-watching ("1.7 million Floridians could soon have ballot access who didn't before."); Staff Reports, *'An important step': Bernie Sanders backs Amendment 4*, Florida Politics (Oct. 28, 2018), https://floridapolitics.com/archives/279196-an-important-step-bernie-sanders-backs-amendment-4 ("[T]here are about 1.7 million convicted felons in the Sunshine State. Amendment 4 would restore voting rights to the vast majority of those individuals[.]"); Sean Pittman, *Amendment 4 Offers Second Chances and a Sensible Addition to the Constitution*, South Florida Times (Nov. 2, 2018), http://www.sfltimes.com/opinion/amendment-4-offers-second-chances-and-a-sensible-addition-to-the-constitution ("If the referendum passes, it will re-instate

that rights restoration would be automatic upon completion of incarceration, parole or probation.[10] Yet, evidence suggests that over eighty percent of otherwise eligible returning citizens owe outstanding LFOs. *See* Smith Report, *Jones v. DeSantis*, No. 4:19-cv-00300 (N.D. Fla. Aug. 02, 2019), Dkt. 98-2. These returning citizens, like Ms. Raysor and Ms. Sherrill, would not yet have completed "all terms of sentence including probation and parole" under the Governor's proffered reading of Article VI, § 4 despite simultaneously having completed "all sentences imposed . . . including but not limited to imprisonment, parole, probation, community control, control release, and conditional release" as required for clemency. Fla. R. Exec.

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the vote to 1.5 million citizens of Florida[.]"); Steve Bousquet, Connie Humburg & McKenna Oxenden, *What's riding on Amendment 4 and voting rights for convicted felons*, Tampa Bay Times (Nov. 2, 2018), https://www.tampabay.com/florida-politics/buzz/2018/11/02/amendment-4-democrats-and-blacks-more-likely-to-have-lost-voting-rights-than-republicans-and-whites/ ("An estimated 1.2 million people who currently can't vote would be affected by the change.").

[10] *See, e.g.*, Wilson, *supra* n.9, (stating in a photo caption that Amendment 4 "would grant some convicted felons, who've served their time, the right to vote"); Susan Frederick-Gray**,** *Our opportunity to support Florida's modern-day suffragists*, Florida Politics (Oct. 10, 2018), https://floridapolitics.com/archives/277189-susan-fredrick-gray-our-opportunity-to-support-floridas-modern-day-suffragists ("Amendment 4, the Second Chances Amendment, would repeal this Jim Crow era ban and re-enfranchise more than a million Floridians—one in 10 of the state's adults—who have served their time but are still sentenced to a civil death."); Joe Henderson, *Polls show strong voter support for Amendment 4*, Florida Politics (Oct. 4, 2018), https://floridapolitics.com/archives/276433-joe-henderson-polls-show-strong-voter-support-for-amendment-4 (Amendment Four "would strike down voting prohibitions for felons who have completed their sentences and parole or probation requirements.").

Clemency 5(E), 9(A)(1), (9)(A)(3). Many of these individuals would be prohibited from registering and voting based on LFOs that do not otherwise disqualify them from rights restoration.

Furthermore, because Florida does not reliably track or disaggregate outstanding LFOs, returning citizens cannot readily determine whether they have disqualifying legal debt, or prioritize paying it off. *See supra* Parts II & III.C. As a result, there is a substantial risk that voters who are eligible for automatic rights restoration will nonetheless be denied the right to vote simply because neither they nor the State can determine whether they have met an eligibility requirement that does not appear in the text of the provision. And, rather than automatically re-enfranchising all returning citizens other than those convicted of the enumerated crimes, an LFO requirement would provide a fast-track for Floridians of means to obtain their voting rights, while leaving those of limited means dependent on the vagaries of the exact system Amendment 4 was meant to replace. Such a strained construction would frustrate rather than fulfill the will of the voters, and should not be adopted. *Gray*, 125 So. 2d at 852.

Further, such a construction is unnecessary because the provision "is fairly subject to another construction which will accomplish the manifest intent and purpose of the voters." *Plante*, 372 So. 2d at 936. Indeed, voters most likely understood the phrase "completion of all terms of sentence including probation and

parole" to require completion of all terms of incarceration and supervision. As discussed *supra* Part II, the plain language fairly supports such an understanding because: (1) it cabins the terms included in completion of sentence to those terms that are of the same type as "probation and parole"; (2) it is consistent with Florida's existing definition of completion of all sentences imposed for the purposes of rights restoration and other clemency procedures; and (3) it is consistent with the phrase as defined in other states. It does not require voters to infer additional requirements not present in the text. *See Millender*, 666 So. 2d at 884. It provides returning citizens with specific notice of what they must do in order to be eligible to vote. And, it does not give rise to arbitrary and discriminatory treatment of returning citizens based solely on their ability to pay. *See supra* Part III.B. The Court should therefore adopt this interpretation, which would fulfill rather than defeat the will of the people. *See Gray*, 125 So. 2d at 852.

C. Statements by the drafters that Article VI, § 4 requires payment of LFOs as a condition of automatic rights restoration are not controlling, and should not be relied upon.

The sole basis offered by the Governor for interpreting Article VI, § 4 to include an LFO requirement appears to be two statements made by the lawyer for the proponents of Amendment 4 during a colloquy with this Court regarding whether the ballot summary provided fair notice to voters of the content of the proposed

amendment. *See* Adv. Op. Request at 1-2.[11] These statements are not determinative. First, the intent of the drafters of a constitutional provision "should be accorded less significance than the intent of the voters as evidenced by materials they had available as a predicate for their collective decision." *Williams v. Smith*, 360 So. 2d. 417, 420 (Fla. 1978). And second, there is no indication this Court relied on that statement in determining that the ballot summary provided fair notice to voters of the Amendment's content.

In *Williams*, the court found the intent of the voters to be "more important[]" than that of the framers. 360 So. 2d. at 420. It declined to "accord the same weight to evidences of intent of an amendment's framer as is given to debates and dialogue leading a proposal adopted from diverse sources," *id.*, because to do so "would allow one person's private documents to shape constitutional policy as persuasively as the public's perception of the proposal," *id.* at n.5. So too should the Court here decline to accord any weight to the passing statements of a single lawyer—statements that are contradicted by the mountain of evidence offered herein of voters' intent to exclude an LFO requirement.[12] This is particularly true where, as here, the statement

[11] In his request, the Governor also points to a letter sent *after* voters amended Article VI, § 4. *See* Adv. Op. Request at 2. Statements made after the voters have acted, however, cannot reasonably be inferred to have informed their intent.

[12] It is worth noting that the attorney appeared to lack practical understanding of existing Florida procedures, or the implications of an LFO requirement. He twice misstated the contents of the then-existing voter registration form, indicating

was elicited in response to repeated questioning from the Court regarding what was included in the phrase "completion of all terms of sentence." *See* Transcript of Oral Argument, *Advisory Op to the Attorney General Re: Voting Restoration Amend.* at 215 So. 3d 1202 (Fla. 2017) (Nos. SC16-1785 and SC16-1981), https://wfsu.org/gavel2gavel/transcript/pdfs/16-1785_16-1981.pdf ("Adv. Op. Transcript"). If a requirement that returning citizens pay off their LFOs was not evident to this Court on the basis of the Amendment's language, the Court should not expect that it was evident to the voters.

Regardless, there is no evidence that this Court relied on that statement in determining that the ballot title and summary "would reasonably lead voters to understand that the chief purpose of the amendment is to automatically restore voting rights to felony offenders, except those convicted of a murder or felony sexual offenses, upon completion of all terms of sentence." *Advisory Opinion to the Attorney Gen. Re: Voting Restoration Amendment*, 215 So. 3d 1202, 1208 (Fla. 2018). Advisory opinions "are only persuasive as to issues they actually address" and the question of whether "completion of all terms of sentence including probation and parole" included an LFO requirement was not before the Court at that time. *Fla.*

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incorrectly that it did not ask registrants with felony convictions whether their rights had been restored. *See* Adv. Op. Transcript at 3, 9. And he was unable to answer a question regarding how the Secretary would verify that LFOs had been paid, or whether that was considered by the drafters. *See id*. at 11.

League of Cities v. Smith, 607, So. 2d 397, 399 n. 3 (Fla. 1992). Thus, the Court should decline to find that the two stray statements made during the colloquy "should shape constitutional policy as persuasively as the public's perception of the proposal." *Williams*, 360 So. 2d. at 420.

CONCLUSION

For the foregoing reasons, the Court should conclude that the phrase "completion of all terms of sentence including probation and parole," in Article VI, § 4 does not include a requirement regarding the payment of LFOs.

September 18, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to The Honorable John A. Thomasino, Clerk of the Supreme Court of Florida, via the Court's e-filing system, and to Governor Ron DeSantis, ron.desantis@eog.myflorida.com, and his counsel Nicholas Allen Primrose, nicholas.primrose@eog.myflorida.com, on September 18, 2019.

/s/ Chad W. Dunn
Chad W. Dunn

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief is submitted in 14-point proportionately spaced Times New Roman font.

/s/ Chad W. Dunn
Chad W. Dunn

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Kelvin Jones, et al.

Plaintiffs,

v. Consolidated Case No. 4:19-cv-300-RH-CAS

Ron DeSantis, et al.,

Defendants.

DECLARATION OF CARLOS J. MARTINEZ IN SUPPORT OF NEITHER PARTY

Pursuant to 28 U.S.C. § 1746, I, Carlos J. Martinez, declare as follows:

1. I am the Miami-Dade County Public Defender and have served in this position for 10 years. Prior to that I held the position of Chief Assistant Public Defender or Assistant Public Defender for approximately 18 years.

2. In my capacity as Public Defender, I supervise nearly 200 attorneys and we handle tens of thousands criminal cases each year. With more than 2.7 million residents, Miami-Dade County (the 11th Judicial Circuit of Florida) is the largest and busiest of Florida's 20 judicial circuits. We help indigent individuals with their criminal cases and provide them guidance regarding their consequences, including dispositional financial assessments like fines, fees, costs, and restitution.

3. The dispositional financial assessment process lacks uniformity even between judges in the same county. Various assessments are found in different sections of the dispositional documents. In Miami Dade, these documents are typically four pages long. The first page is the order of judgment. The second page typically includes dispositional financial assessments

such as fees. The third page is formally called the "Sentence." It outlines the terms of incarceration or supervision but never includes fees. Sometimes, but rarely this section includes fines and/or restitution. Occasionally, the fourth page is included in the sentence section. Restitution is typically entered as part of the Sentence or as a condition of probation in a separate probation order. Over the years, what is in the dispositional documents have changed over time. Additionally, many cases are very old and their documents are stored in microfilm. These variations make it extremely difficult for an attorney, much less an individual with a felony conviction to understand which financial assessments are part of the sentence for purposes of SB 7066.

4. In my time as Public Defender for Miami Dade County, I have also worked in conjunction with public defenders offices in other counties and become familiar with processes in other counties. Different counties use different documents in their sentencing orders, and the contents of the orders vary depending on local practice.

5. While every felony case that resulted in a conviction includes a court order, not every county makes these documents publicly available online. In Miami Dade, these documents are only online for cases after 2017. This means that an individual who no longer has her sentencing documents may not be able to determine whether financial assessments are part of her sentence under SB 7066, even if she had the legal expertise to know where to look in the documents. Moreover, if that person were receiving assistance from a canvasser, organizer, or attorney, those records would not be available on the spot. Those records would have to be ordered from the Clerk of the Court, and depending on the age of the case, retrieved from a records center or from microfilm.

6. When a person is on a payment plan for her financial assessments, she generally does not have control over which parts of her assessments those payments go towards first. That means that she may be or have been paying off assessments that would not impact the right to vote under SB 7066. For example, payments may be going towards late fees or court costs that are not a part of the disqualifying debt under SB 7066.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 18, 2019 in Miami, Florida.