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Punishment Only for the Poor: The Unconstitutionality of Pay-to-Vote Disenfranchisement Laws

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PUNISHMENT ONLY FOR THE POOR: THE UNCONSTITUTIONALITY OF PAY-TO-VOTE DISENFRANCHISEMENT LAWS

ABSTRACT

Felony disenfranchisement has remained a longstanding practice in the United States, utilized by nearly every state in the Union to punish those convicted of a felony with a bar from the franchise. However, when individuals attempt to re-obtain their voting rights, individual state restoration systems vary immensely, with some providing automatic restoration following incarceration and others requiring payment of legal financial obligations, such as fines or restitution. In the wake of a constitutional amendment to provide automatic restoration, the Florida legislature proposed a new system in SB 7066, aimed at curbing the effects of the amendment. Now signed into law, this new scheme disallows restoration until the individual has fully paid all fines, fees, and restitution associated with their sentence. It has since been challenged and was upheld by the Eleventh Circuit in Jones v. Governor of Florida.

This Comment explores the Eleventh Circuit decision in Jones, positing that the majority came to an erroneous conclusion by both employing the wrong classification and wrongfully applying its precedent. Accordingly, noticing the disastrous effects of these deficiencies in Jones, this Comment argues for a new path forward in judicial review of payment-based restoration laws, uniting the Supreme Court's jurisprudence on wealth discrimination both within the criminal justice system and within access to the franchise. Such a union should require heightened scrutiny for all laws seeking to provide criminal punishments based on one's inability to pay due to the law's intent to criminalize poverty, especially when such punishments deprive an individual of a right as fundamental as the one to vote.

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INTRODUCTION

Bonnie Raysor owes \$4,260 in outstanding fees and costs related to a felony conviction and two prior misdemeanor convictions.¹ These fees were “levied . . . in the form of a civil lien.”² The total is comprised of “court costs, [the] cost of prosecution, [the] crime stoppers fund, [the] cost of investigation, [the] drug trust fund, [a] public defender application fee, and [a] public defender fee.”³ Raysor pays \$30 per month towards her balance.⁴ She has lived in Florida since she was seventeen and currently lives in Boynton Beach, Florida.⁵ She holds a bachelor’s degree in finance and accounting.⁶ She homeschooled her three children and now enjoys taking care of her grandchildren, teaching Sunday school, and working as an office manager.⁷ Ms. Raysor’s prior convictions stem from her battle with opioids—a battle that began to cope with her father’s illness.⁸ She will be disenfranchised until this amount is paid off in full by 2031, when she will be seventy years old.⁹

Steven Phalen “owes approximately \$110,000 in restitution, court costs, and fees” from a felony conviction in Wisconsin state court.¹⁰ After losing his father at five years old, Mr. Phalen used alcohol as a coping mechanism.¹¹ His arson conviction arose from a split-second decision that he made at twenty-three-years-old while under the influence of alcohol.¹² He “cannot afford to pay back

¹ Complaint at 5–6, *Raysor v. Lee* (N.D. Fla. 2019) (No. 4:19-cv-00301-RH-MJF), consolidated in *Jones v. DeSantis*, 410 F. Supp. 3d 1284 (N.D. Fla. 2019) (No. 4:19-cv-00301-RH-MJF) [hereinafter *Raysor* Complaint].

² *Id.* at 7.

³ *Raysor* Complaint, *supra* note 1, at 7; see also FLA. STAT. § 16.555(5)(b)–(d) (2020) (noting that costs levied under the crime stoppers fund are used to support a jurisdiction’s crime fighting programs through the award of grants to eligible counties).

⁴ *Id.*

⁵ *E.g., id.* at 5.

⁶ Bonnie Raysor, *Florida Is Trying to Silence Me with a Poll Tax*, CAMPAIGN LEGAL CTR. (May 7, 2019), <https://campaignlegal.org/story/florida-trying-silence-me-poll-tax>.

⁷ *Id.*

⁸ *Id.*; *Raysor* Complaint, *supra* note 1, at 7.

⁹ *Raysor*, *supra* note 6.

¹⁰ See Consolidated Pretrial Brief for Plaintiff at 12, *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla. 2020) (No. 4:19-cv-300-RH-MJF) [hereinafter *Jones* Consolidated Brief]; see also Lawrence Mower, *What Now? Amendment 4, Felon Voting Move to Florida Courts*, TAMPA BAY TIMES (July 1, 2019), <https://www.tampabay.com/florida-politics/buzz/2019/07/01/what-now-amendment-4-felon-voting-moves-to-the-courts/> (“[Phalen]’s paid down more than \$40,000 of his \$150,000 in restitution and fees so far, but acknowledges he’ll probably die in debt.”)

¹¹ See Daniel A. Gross, *What It Felt Like for a Florida Man with a Felony to Regain His Voting Rights*, NEW YORKER (Nov. 7, 2018), <https://www.newyorker.com/news/as-told-to/what-it-felt-like-for-a-florida-man-with-a-felony-to-regain-his-voting-rights>.

¹² *Id.*

his [costs] in full” and cannot seek a community service modification to reduce his financial obligations due to his out-of-state conviction.¹³ Mr. Phalen has a Ph.D. in organizational and relational communications and currently works in HVAC logistics.¹⁴ He is passionate about social rights and social justice and seeks to promote compassion throughout his life.¹⁵ With such high amounts due and no alternatives available, Mr. Phalen will be disenfranchised indefinitely.

Racquel Wright owes over \$72,000 in court fees and a mandatory fine arising “from a single non-violent drug conviction . . . [over] eight years ago.”¹⁶ Her initial fee was \$50,000, but it has since grown due to interest accrual.¹⁷ She has been turned down for jobs at 7-11, McDonalds, and Walmart because her fifteen years as an educator has made her “overqualified.”¹⁸ She has a fourteen-year-old daughter who she says taught her everything she knows.¹⁹ She “works part-time as a legal assistant to the Special Counsel to the Florida State Conference of the NAACP” and volunteers as the Assistant Secretary of her local branch of the NAACP.²⁰ Although Ms. Wright has attempted to maintain an active role politically organizing in her own community, she cannot take her own activism to the ballot box as her criminal debt increases despite her struggles to satisfy it.²¹

The three individuals described above are not alone. As of 2016, there are an estimated 1.5 million Floridians who have been disenfranchised as a result of a felony conviction.²² Florida’s disenfranchisement accounts for twenty-seven percent of America’s disenfranchised population.²³ Of these 1.5 million Floridians, at least 750,000 have outstanding financial obligations from prior convictions.²⁴ Roughly seventy to eighty percent “are indigent and unable to

¹³ See *Jones Consolidated Brief*, *supra* note 10, at 13.

¹⁴ See *id.* at 12.

¹⁵ See Gross, *supra* note 11.

¹⁶ See *Jones Consolidated Brief*, *supra* note 10, at 12; Leadership Conference on Civil and Human Rights, *Remarks by Racquel Wright*, FACEBOOK (Feb. 29, 2020), <https://www.facebook.com/watch/?v=637620120406661>.

¹⁷ *Jones Consolidated Brief*, *supra* note 10; see Leadership Conference on Civil and Human Rights, *supra* note 16.

¹⁸ Leadership Conference on Civil and Human Rights, *supra* note 16.

¹⁹ See *id.*

²⁰ See *Jones Consolidated Brief*, *supra* note 10, at 12.

²¹ See Leadership Conference on Civil and Human Rights, *supra* note 16.

²² CHRISTOPHER UGGEN, RYAN LARSON & SARAH SHANNON, *SIX MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016*, at 3 (2016).

²³ *Id.*

²⁴ See Patricia Mazzei & Michael Wines, *How Republicans Undermined Ex-Felon Voting Rights in Florida*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/09/17/us/florida-felons-voting.html>.

pay” these amounts.²⁵ The average income of an individual reentering society after a term of imprisonment is \$1,559 per month.²⁶ An internal analysis done by the Florida Department of Corrections on “22,012 individuals on probation, parole, or community supervision found that they owed an average of \$8,195 in restitution alone,” not including fines and fees.²⁷ This discrepancy makes satisfying full amounts nearly impossible. Further, as described more fully below, even those that may have the resources to pay are unable to fully satisfy their debts as Florida has not maintained a central database to track these obligations.²⁸ As a result, many are unaware and unable to determine how much money they truly owe.²⁹

Senate Bill 7066, passed into law by the Florida legislature, requires full payment of all legal financial obligations (LFOs) for restoration and is the main provider of this widespread disenfranchisement.³⁰ Each time an election comes around, many Floridians, such as Ms. Raysor, are barred from casting a ballot despite having served their respective sentences and beginning the difficult process of reintegration. Based on her current trajectory, Ms. Raysor will not be able to register for another twelve years and will not cast another ballot until she is seventy years old.³¹ Despite contributions to their communities, these individuals remain disenfranchised indefinitely due to the state’s attempt to provide a lifelong punishment for prior criminal offenses.³² The state burdens these individuals with a harm for which they can never truly recover as elections pass them by.³³

This Comment aims to address this harm, asking why we permit a justice system that criminalizes those in poverty to strip away fundamental rights

²⁵ *Id.*

²⁶ GEO. L. C.R. CLINIC, CAN’T PAY, CAN’T VOTE: A NATIONAL SURVEY ON THE MODERN POLL TAX 22 (2019).

²⁷ *Id.*

²⁸ Amy Gardner & Lori Rozsa, *In Florida, Felons Must Pay Court Debts Before They Can Vote. But with No System To Do So, Many Have Found It Impossible*, WASH. POST (May 13, 2020), https://www.washingtonpost.com/politics/in-florida-felons-must-pay-court-debts-before-they-can-vote-but-with-no-system-to-do-so-many-have-found-it-impossible/2020/05/13/08ed05be-906f-11ea-9e23-6914ee410a5f_story.html.

²⁹ *Id.*

³⁰ See FLA. STAT. § 98.0751(2)(a) (2020).

³¹ See *Raysor* Complaint, *supra* note 1, at 7–8.

³² See State Defendants Brief on Appeal of Preliminary Injunction at 1, *Jones v. DeSantis*, 410 F. Supp. 3d 1284 (N.D. Fla. 2019) (No. 19-14551) [hereinafter State Defendants Brief on Appeal] (describing the intent of the legislature as “limit[ing] re-enfranchisement to felons who have fulfilled all terms of punishment imposed on them, including monetary ones”).

³³ *Jones v. DeSantis*, 410 F. Supp. 3d 1284, 1310 (N.D. Fla. 2019) (“When an eligible citizen misses an opportunity to vote, the opportunity is gone forever; the vote cannot later be cast. So, when a state wrongly prevents an eligible citizen from voting, the harm to the citizen is irreparable.”).

indefinitely, using Florida's latest iteration of felony disenfranchisement and its subsequent challenge in *Jones v. Governor of Florida*³⁴ as an example.³⁵ Simply put, the court in *Jones* got it wrong; therefore, restrictions on access to the franchise should not turn on wealth-based distinctions; accordingly, such restrictions demand heightened scrutiny.

Part I of this Comment provides the theoretical lens through which the argument must be viewed, discussing the criminalization of poverty and how pay-to-vote felony restoration is the most recent attempt at engraining this theory within our justice system. Part II begins to contextualize the issue, reviewing the various types of felony disenfranchisement laws employed across the nation. Part III will focus on the example of Florida, providing an overview of its disenfranchisement scheme from inception up to present day and presenting the appellate history of *Jones* up to the most recent decision by the Eleventh Circuit Court of Appeals.³⁶ Part IV focuses on the Eleventh Circuit's ruling in *Jones*, noting the deficiencies in the majority's reasoning to provide an example of why the courts continue to misrepresent payment-based restoration laws and why current precedent is not sufficient to address these constitutional issues. Part V utilizes the jurisprudence regarding wealth-based distinctions both within the rights provided for criminal defendants and within access to the franchise to design a new framework for reviewing laws that aim to deprive citizens of fundamental rights on the basis of payment. Lastly, Part VI concludes by exploring the implications heightened scrutiny would have on both the individuals who could be re-enfranchised and American democracy.

I. THE CRIMINALIZATION OF POVERTY

Felony disenfranchisement statutes that employ a pay-to-vote scheme are a symptom of a larger disease embedded in the American legal system—the criminalization of poverty. Thus, this theory provides the lens through which the Comment should be read.

The criminalization of poverty can be described as two sides of the same coin.³⁷ On the one hand, many facets of poverty have been deemed criminal,

³⁴ *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020) (en banc).

³⁵ In the Northern District of Florida, the court referred to the case as *Jones v. Desantis*. However, as the case moved to the Eleventh Circuit Court of Appeals, the name was altered to *Jones v. Governor of Florida*. For clarity's sake, this Comment will refer to the case as *Jones*.

³⁶ *Id.*

³⁷ Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 446 (2015).

such as the homeless being penalized for sleeping in particular places, working women losing welfare benefits when unable to locate childcare, and punishments for “dependence on governmental benefits or informal sources of income.”³⁸ After being subjected to criminal prosecution, the matter only worsens, as eighty percent of criminal defendants cannot afford counsel and are forced to “rely on a public defense system that spends an average of \$12 per capita.”³⁹ So, when these poverty-related crimes force individuals into the criminal justice system, the results are disastrous.

On the other hand, the criminalization of poverty also encompasses the notion that “brushes with the criminal system tend to make people poor.”⁴⁰ This entails the imposition of fines and fees, as well as the long-lasting effects a criminal record has upon the ability to access “jobs, credit, and [other] resources.”⁴¹ A conviction—even those associated with misdemeanor crimes—“necessarily diminish[es] one’s earning capacity and employment prospects, as well as one’s eligibility for other social goods, such as professional licenses, some public and subsidized housing, and other public benefits.”⁴²

Moreover, with less access to resources within civil society and the loss of access to public benefits,⁴³ those in poverty will utilize the “oddly beneficial functions of the penitentiary,” such as “job-placement and drug treatment programs, mental health services, domestic violence shelters, and individual and family counseling.”⁴⁴ Similarly, the American welfare system has begun to assert criminality on the front-end by “assum[ing] the criminality” of its recipients and pursuing heavy surveillance of those enrolled.⁴⁵ The system has thus demonstrated a “greater willingness to spend money to police the poor,” rather than alleviate their struggles.⁴⁶ Not only does this criminalization of poverty target the poorest of society, it also reinforces this poverty after convictions or terms of incarceration, creating a cycle from which it is difficult

³⁸ *See id.*

³⁹ Alexandra Natapoff, *The Penal Pyramid*, in *THE NEW CRIMINAL JUSTICE THINKING* 71, 79 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

⁴⁰ *See* Natapoff, *supra* note 37, at 446.

⁴¹ *Id.*

⁴² Bridget McCormack, *Economic Incarceration*, 25 *WINDSOR Y.B. ACCESS TO JUST.* 223, 227 (2007).

⁴³ MARC MAUER & VIRGINIA MCCALMONT, *A LIFETIME OF PUNISHMENT: THE IMPACT OF THE FELONY DRUG BAN ON WELFARE BENEFITS* 7 (2013).

⁴⁴ MEGAN COMFORT, *DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON* 182 (2008).

⁴⁵ *See* KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* 1, 58–59 (2011).

⁴⁶ *Id.* at 59.

to escape.⁴⁷ Such a cycle has created an under-class, relegating many poor individuals to a second-class citizenship by stripping them of their power to participate in the legal and political system.⁴⁸

As stated above, a large facet of the criminalization of poverty involves the concept that contact with the criminal justice system tends to exacerbate poverty, primarily through the imposition of user fees associated with the adjudication system.⁴⁹ Some of these financial obligations include probation oversight fees; tether fees in driving; drug testing costs; reimbursement fees to police, prosecutors, and public defenders; application fees to request a public defender; and the costs of court-ordered programs.⁵⁰ These costs are levied without acknowledgement of the financial status of the defendant, despite there being little evidence of their effectiveness as a deterrent.⁵¹

In Florida, the fees imposed are the same whether a defendant is convicted of a violent or a non-violent felony or whether the defendant admits guilt or pleads no contest.⁵² On average, these fees include \$50 for an application for a public defender, “\$100 for actual representation by [that] public defender,” \$100 minimum for the state’s attorney, and “\$225 as ‘additional court costs’” (\$25 of which goes into the State’s General Revenue Fund)—leaving each defendant with \$475 in fees alone.⁵³ This does not include any fines or restitution additionally imposed during sentencing.⁵⁴ The costs associated with public defense are levied even if defendants have demonstrated indigency, “requir[ing] a convicted defendant to pay the state back for the expense of providing the attorney.”⁵⁵ When accounting for more than just user fees, the average amount of restitution totals \$17,872; if disregarding those who owe “extraordinarily high

⁴⁷ McCormack, *supra* note 42, at 241–42. This cycle can be seen in the way defendants often face the difficult choice of enduring incarceration or taking on greater LFOs. *Id.*

⁴⁸ See Natapoff, *supra* note 39, at 79 (finding eighty percent of criminal defendants cannot afford counsel). In terms of felony convictions aggravating one’s poverty, “[r]eentering citizens in Florida have an estimated monthly income of \$1,559.” See GEO. C.R. CLINIC, *supra* note 26, at 22.

⁴⁹ McCormack, *supra* note 42, at 227.

⁵⁰ *Id.* For example, treatment programs cost around \$250 to \$500, probation fees are roughly \$20 a month, drug screenings (often required in probationary periods) cost \$25 a week, and recovery costs to the police, prosecutor, and public defender can range from \$100 to \$300. *Id.* at 234. These fees are often in addition to any fines assessed as a result of the actual crime committed. *Id.*

⁵¹ *Id.* at 227. At times, these pay-or-stay systems may actually have the adverse effect, encouraging individuals to pursue more illicit ways to quickly find funds to avoid incarceration. *Id.* at 239–40.

⁵² See FLA. STAT. § 938.05(1).

⁵³ Jones v. DeSantis, 410 F. Supp. 3d 1284, 1297 (N.D. Fla. 2019).

⁵⁴ *Id.*

⁵⁵ *Id.*

restitution,” the average still amounts to \$8,195.⁵⁶ One re-entry program reported their clients had LFO debt that ranged from \$100 to \$300 a month.⁵⁷

If defendants are unable to pay these fees, there are often two potential consequences: (1) additional fines for late payments or failure to pay, or (2) incarceration.⁵⁸ Even defendants who attempt earnestly to make payments can be incarcerated or made to pay the entire amount the day they appear in court—often referred to as “pay-or-stay” schemes.⁵⁹

Ultimately, poverty has created a schism in how the criminal justice system functions for different individuals, described as a “penal pyramid.”⁶⁰ At the top of the pyramid is “the world of federal offenses, serious cases, and well-resourced defenses.”⁶¹ This is far different from the “sprawling bottom,” where “offenses are petty and caseloads number in the thousands.”⁶² Whereas rules prevail at the top, in this bottom portion “outcomes are driven by institutional practices and inequalitarian social relations.”⁶³ The bottom of the pyramid contains “overworked public defenders who ‘meet and plead’ their clients in mere minutes,” perpetuating mass injustice and allowing debtors’ prisons to thrive.⁶⁴ Defendants have fewer resources and less access to counsel, and those who cannot make bail “languish in jail for months and may eventually plead guilty just to get out.”⁶⁵ Some defendants will choose to be incarcerated rather than be burdened by the imposition of fines—knowing they could handle a stint in jail but would be destroyed by thousands of dollars in LFOs.⁶⁶

Already bound to our criminal justice system, this pervasive ideology has found its home within rights restoration schemes across the country. As discussed later, ten states indefinitely deny the right to vote to those with felony convictions until these individuals have fully paid off their LFOs.⁶⁷ In Florida,

⁵⁶ REBEKAH DILLER, *THE HIDDEN COST OF FLORIDA’S CRIMINAL JUSTICE FEES* 11 (2010). This data was aggregated from a 2005 internal analysis completed by the Florida Department of Corrections of the 22,379 individuals on probation, parole, or community supervision who owed restitution. *Id.*

⁵⁷ *Id.* at 10.

⁵⁸ McCormack, *supra* note 42, at 234.

⁵⁹ *Id.* at 235–36.

⁶⁰ Natapoff, *supra* note 39, at 71–72.

⁶¹ *Id.* at 72.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* See generally ACLU, *IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS* (2010) (providing an overview of incarceration for unpaid debts following a yearlong investigation).

⁶⁵ Natapoff, *supra* note 39, at 78.

⁶⁶ McCormack, *supra* note 42, at 241–42.

⁶⁷ MARGARET LOVE & DAVID SCHLUSSEL, *WHO MUST PAY TO REGAIN THE VOTE: A 50-STATE SURVEY* 4 (2020).

these costs are assessed regardless of outside factors like the individual's culpability.⁶⁸ Thus, defendants who cannot afford to pay for their own attorney are saddled with thousands of dollars in LFOs.⁶⁹ Furthermore, many of these individuals are unaware that their felony conviction and subsequent LFOs will affect on their ability to cast a ballot.⁷⁰ When the court system upholds these statutes conditioning restoration on payment, those unable to pay can only reacquire their voting rights by winning the lottery, as one former felon suggested.⁷¹

The criminalization of the poorest among us is so divorced from the rule of law and so devoid of justice that it requires an evaluation of its predominant nature within civil society: why do we permit this system to strip away the fundamental rights of so many individuals indefinitely? More importantly, does the U.S. Constitution permit this apparent debt-based restoration?

II. FELONY DISENFRANCHISEMENT AND RIGHTS RESTORATION THROUGHOUT THE COUNTRY

Felony disenfranchisement schemes are not unique to Florida. In 1776, Virginia became the first state to include a law in its state constitution stripping away the political rights of those convicted.⁷² By the passage of the Fourteenth Amendment, twenty-nine states had adopted laws denying the right to vote to those with felony convictions, arising as a means to suppress Black voters in the Reconstruction Era.⁷³

⁶⁸ Jones v. DeSantis, 410 F. Supp. 3d 1284, 1297 (N.D. Fla. 2019) (“Florida law requires the judge to impose fees [with a] primary purpose . . . to raise revenue . . . [with] no apparent relationship to culpability.”).

⁶⁹ LOVE & SCHLUSSEL, *supra* note 67, at 68–69.

⁷⁰ See, e.g., The Daily, *The Field: The Fight for Voting Rights in Florida*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/10/02/podcasts/the-daily/voting-rights-florida-election.html>. In an interview with Julius Irving, a former felon now working to help register individuals to vote in Florida, reporter Nick Casey asked, “Did anybody explain to you what rights you were going to lose with a felony charge, with a drug charge?” Julius responded, “Nah not really. No, sir.” The conversation continues, with Casey stating, “And I don’t imagine you were thinking about voting at that point.” Julius responds, “Not at all, not even a little bit. At that time, voting was probably the farthest thing from my mind.” *Id.* at 10:31–10:51.

⁷¹ Patricia Mazzei, *Floridians Gave Ex-Felons the Right to Vote. Lawmakers Just Put a Big Obstacle in Their Way*, N.Y. TIMES, May 4, 2019, at A11. In this *New York Times* story, Coral Nichols—who owes \$190,000 in restitution—said she would be unable to register to vote for the rest of her life “unless [she] won the lottery.” *Id.*

⁷² George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 853 (2005).

⁷³ Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349, 360–61 (2012). For more about the use of felony disenfranchisement laws in the Jim Crow Era and the racial dimensions of felony disenfranchisement, see generally Bailey Figler, *A Vote for*

Today, forty-eight states—all but Maine and Vermont—have some form of felony disenfranchisement laws; thus, those without indefinite disenfranchisement to employ a process for an individual to re-obtain their voting rights.⁷⁴ Ten states in total deny restoration indefinitely until payment of LFOs are complete.⁷⁵ Three states—Alabama, Arkansas, and Florida—deny the vote indefinitely until all LFOs are paid.⁷⁶ Five states—Arizona, Georgia, Kansas, Texas, and Tennessee—deny restoration based upon repayment of certain LFOs, such as only requiring full payment of restitution.⁷⁷ Lastly, two states—Connecticut and South Dakota—deny enfranchisement indefinitely for unpaid LFOs based on certain types of convictions.⁷⁸

Particularly, in Tennessee, the legislature instituted a system in which eligibility for restoration is contingent upon full payment of restitution, court costs, and child support obligations.⁷⁹ Under this system, former felons are required to be current in support payments before registering.⁸⁰ Despite a

Democracy: Confronting the Racial Aspects of Felon Disenfranchisement, 61 N.Y.U. ANN. SURV. AM. L. 723 (2006).

⁷⁴ LOVE & SCHLUSSEL, *supra* note 67, at 4. Additionally, D.C. does not employ a disenfranchisement scheme. *Id.*

⁷⁵ *Id.* at 4.

⁷⁶ *Id.*; see ALA. CODE § 15-22-36.1 (2020) (requiring the person applying for voter eligibility to pay “all fines, court costs, fees, and victim restitution ordered by the sentencing court at the time of sentencing on disqualifying cases”); ARK. CONST. amend. 51, § 11 (“It is the duty of any convicted felon who desires to register to vote to provide . . . proof . . . [they] ha[ve] paid all probation or parole fees . . . [and] all applicable court costs, fines, or restitution.”); FLA. STAT. § 98.0751(2)(a) (2020) (defining the “[c]ompletion of all terms of sentence” required for enfranchisement as including “[f]ull payment of restitution” and “[f]ull payment of fines or fees ordered by the court as a part of the sentence or . . . as a condition of any form of supervision,” even upon “conversion to a civil lien”).

⁷⁷ LOVE & SCHLUSSEL, *supra* note 67, at 4. Arizona provides for automatic restoration “if the person pays any victim restitution imposed.” ARIZ. REV. STAT. § 13-907(A). Georgia’s law requires those who have been convicted of a felony to register to vote upon “completion of the sentence,” which has been interpreted to include payment of fines imposed by statutory authority. See GA. CODE ANN. § 21-2-216 (2020); 1984 Ga. Op. Att’y Gen. No. 84-33, 1984 WL 59904. Kansas law renders those with felony convictions ineligible to vote until “such person has completed the terms of the authorized sentence.” See KAN. STAT. ANN. § 21-6613(b). Although the statute does not explicitly condition repayment, Kansas law permits payment of restitution or fees to be a condition of probation, and as of 2018, the Secretary of State has not allowed registration of those with outstanding LFOs related to restitution, probation, and parole related fees. See KAN. STAT. ANN. §§ 21-6611, 21-6607; Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 66–67, 67 n.44 (2019) (citing Telephone Interview with Jameson Beckner, Assistant Dir. of Elections, Kan. Sec’y of State (June 6, 2018)). Texas conditions enfranchisement upon fines associated with the sentence, not court costs and restitution. See TEX. ELEC. CODE ANN. § 11.002 (2020). Lastly, Tennessee conditions restoration of voting rights upon full payment of restitution, court costs, and child support obligations. See TENN. CODE ANN. § 40-29-202 (2020).

⁷⁸ LOVE & SCHLUSSEL, *supra* note 67, at 4. Connecticut conditions denial on federal and out-of-state convictions. See CONN. GEN. STAT. ANN. § 9-46a(a). South Dakota’s LFO-based denial applies to all convictions after June 30, 2010. See S.D. COD. LAWS § 12-4-18; S.D. ADMIN. R. 5:02:03:24.

⁷⁹ TENN. CODE ANN. § 40-29-202 (2020).

⁸⁰ *Id.*

challenge before the U.S. Court of Appeals for the Sixth Circuit, the law was upheld on the basis that wealth-based classifications do not invoke a suspect class and the law shared a rational relationship to the state's interest in collecting child support.⁸¹

However, the majority of states do not condition restoration on the basis of repayment. Thirty-six states and the District of Columbia do not employ schemes that allow outstanding LFOs to deny enfranchisement indefinitely.⁸² Seventeen states provide for enfranchisement immediately after incarceration.⁸³ Furthermore, "sixteen states allow LFOs to delay enfranchisement" but not necessarily indefinitely.⁸⁴ Lastly, four states restore by discretionary powers embodied in state constitutions.⁸⁵

As an example, Iowa's system has seen recent changes allowing for the inclusion of two restoration systems working simultaneously.⁸⁶ First, the governor has signed an executive order permitting automatic restoration for non-violent former felons who were not convicted under Iowa's "Homicide and Related Crimes" chapter after "discharge of sentence."⁸⁷ Discharge of sentence refers to "completion of any term of confinement, parole, probation, or other supervised release."⁸⁸ For those convicted of a violent felony under the "Homicide and Related Crimes" chapter of the Iowa code, the state operates a clemency system.⁸⁹ Within the clemency system, eligibility for restoration is conditioned upon discharge of probation or parole, and the "applicant must have completed repayment of court costs, restitution, and fines, *or* must be current on

⁸¹ *Johnson v. Bredesen*, 624 F.3d 742, 746, 747, 750 (6th Cir. 2010). This law was upheld by the Sixth Circuit despite there being no evidence that child support payments are in any way related to one's criminal charge. *See id.* In its evaluation of the Fourteenth Amendment claim, the Sixth Circuit failed to address voting as a fundamental right that may invoke heightened scrutiny. *Id.* at 746.

⁸² LOVE & SCHLUSSEL, *supra* note 67, at 4.

⁸³ *Id.* Those states are Colorado, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah. *Id.*

⁸⁴ *Id.* Those states are Alaska, California, Delaware, Idaho, Louisiana, Minnesota, Missouri, Nebraska, New Mexico, New York, North Carolina, South Carolina, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

⁸⁵ *Id.* Those states are Iowa, Kentucky, Mississippi, and Virginia. *Id.*

⁸⁶ *Voting Rights Restoration*, OFFICE OF THE GOVERNOR OF IOWA, <https://governor.iowa.gov/services/voting-rights-restoration> (last visited Nov. 16, 2021).

⁸⁷ *Id.*

⁸⁸ *Id.* Governor Reynolds promised "to continue to advocate for a constitutional amendment," codifying this automatic restoration. *See* Press Release, Kim Reynolds, Governor of Iowa, Gov. Reynolds Signs Exec. Ord. to Restore Voting Rts. of Felons Who Have Completed their Sentence (Aug. 5, 2020), <https://governor.iowa.gov/press-release/gov-reynolds-signs-executive-order-to-restore-voting-rights-of-felons-who-have>.

⁸⁹ *Voting Rights Restoration*, *supra* note 86.

a payment plan.”⁹⁰ Iowa’s system is unique in that it still requires the state to receive repayment of these fees and fines but allows for enfranchisement before the total amount is paid off in full. On the contrary, systems like Florida’s, which require *full* payment before allowing registrations, create a burden that could take an individual their entire life to meet.⁹¹

III. FLORIDA’S RIGHTS RESTORATION FRAMEWORK: PAST AND PRESENT

Florida has experienced fluctuations within its felony disenfranchisement and rights restoration system since its inception in 1868. However, one thing within its operation has remained consistent—once the will of the people expands the grant of restoration permitting more Floridians to cast their ballot, the state quickly implements a reversion.

This Part details this complicated history, beginning in section A. Sections B and C discuss the historic passing of Florida Amendment Four, the status of felony registrations in Florida in the months that followed, and the legislature’s culling response in SB 7066. Section D focuses on the subsequent challenge of the statute in *Jones*, whose progeny has formed the basis of this Comment.

A. *The History of Florida’s Restoration Scheme*

Florida’s legal system has employed some form of felony disenfranchisement since 1868.⁹² Article XIV, Section 2 of Florida’s 1868 Constitution first “imposed a lifetime voting ban for people with felony convictions.”⁹³ Within the same article, the Constitution “directed the legislature to ‘enact the necessary laws to exclude from . . . the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime.’”⁹⁴ Many historians note that this felony disenfranchisement provision arose shortly after Florida was required to pass the Reconstruction Amendments.⁹⁵ This version of Florida’s felony disenfranchisement law remained until 1968, when the state

⁹⁰ *Id.* (emphasis added); see *infra* Part III.C.

⁹¹ See *id.*; see also *Raysor Complaint*, *supra* note 1, at 2, 7, 10–11, 14 (detailing the struggles of various individuals to satisfy their LFO debt).

⁹² ERIKA L. WOOD, FLORIDA: AN OUTLIER IN DENYING VOTING RIGHTS 1, 5 (2016), https://www.brennancenter.org/sites/default/files/publications/Florida_Voting_Rights_Outlier.pdf.

⁹³ *Id.*

⁹⁴ *Id.* (quoting FLA. CONST. art. XIV, § 2 (1868)).

⁹⁵ See *id.* at 5–7. These specific crimes were the same crimes echoed in the sentiments of Florida’s Black Code, which aimed to systematically subjugate Black Americans in response to the passage of the Reconstruction Amendments. *Id.* at 4–5.

drafted a new constitution.⁹⁶ The 1968 Constitution eliminated the delineation of specific crimes and maintained blanket disenfranchisement, rewriting the law to read, “No person convicted of a felony . . . shall be qualified to vote . . . until restoration of civil rights.”⁹⁷ This began the era of clemency-based restoration.⁹⁸

From 1968 to 2018, Florida’s constitutional disenfranchisement provision remained the same. This disenfranchisement scheme has been regarded as “unique” in that it left those with felony convictions permanently disenfranchised until the individual took action toward restoration.⁹⁹ Despite the provision containing the same language, those with felony convictions experienced a series of fluctuations when attempting to reacquire their voting rights. In 1974, the Florida legislature intended to provide automatic restoration following the completion of parole or release from custody; however, in an advisory opinion, the Florida Supreme Court rejected the law, claiming it “unconstitutionally infringed upon the constitutional power of the Governor . . . to restore civil rights.”¹⁰⁰ Thus, this first attempt to provide restoration exemplifies the framework for disenfranchisement in Florida for years to come—when the will of the people trends towards restoration, the state provides a course correction offering restrictions as a reversion.

This framework continued between 1975 and 1991. Those formerly incarcerated experienced near automatic restoration as the only requirement was to apply and prove eligibility.¹⁰¹ Here, eligibility included “completion of all sentences imposed and all conditions of supervision.”¹⁰² However, in 1991, the state added a new requirement—a hearing—and by 1999, the crimes requiring a hearing before restoration had increased.¹⁰³ However, by 2007, Governor Charlie Crist began to tilt the balance once again, attempting to clarify and streamline the restoration process.¹⁰⁴ Under his leadership, those convicted of non-violent crimes were not required to take any action nor petition; rather, the

⁹⁶ *Id.* at 7.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Allison J. Riggs, *Felony Disenfranchisement in Florida: Past, Present and Future*, 28 J. C.R. & ECON. DEV. 107, 107–08 (2015). To have one’s rights restored during this time, an individual was required to file an application with the State to approve eligibility for enfranchisement. Until 2018 when Amendment Four was passed, this process often required a hearing before the Clemency Board. *Id.* at 109; *see also infra* Part III.B (explaining how Amendment Four aimed to transform Florida’s restoration system).

¹⁰⁰ *Id.* (citing *In re Advisory of the Governor of C.R.*, 306 So. 2d 520, 524 (Fla. 1975)).

¹⁰¹ *Id.*

¹⁰² *See* FLA. ADVISORY COMM. TO THE U.S. COMM. ON C.R., EX-FELON VOTING RIGHTS IN FLORIDA 24 (2008).

¹⁰³ Riggs, *supra* note 99, at 109.

¹⁰⁴ *Id.* at 110.

Parole Commission “would send a list of [those] eligible” to the Clemency Office, and those individuals could bypass a hearing or investigation.¹⁰⁵

As previously noted, these swings towards restoration were nearly always met with a retreat. By 2011, under the leadership of Governor Rick Scott, the Clemency Board voted unanimously to restrict the restoration process, resulting in two new rules.¹⁰⁶ The first rule applied to those convicted of a violent felony and required a *seven* year wait after completion of their sentence to petition for restoration, and then involved an investigation and hearing before the Clemency Board.¹⁰⁷ The second rule applied to those convicted of non-violent crimes; this required a *five* year wait but did not always require a hearing.¹⁰⁸ Under these rules, if denied restoration, an applicant was required to wait two years before reapplying.¹⁰⁹ Further confounding the difficulty of this process, the Clemency Board only met quarterly, which led several former offenders to experience delays far more than the required five or seven year waits.¹¹⁰ During this period, the Board was reported to “ha[ve] a backlog of more than 10,000 applications” and averaged only 400 restorations per year.¹¹¹ Throughout Rick Scott’s first seven years as governor, only 3,000 individuals had their rights restored as compared to the 150,000 individuals who had their rights restored during the tenure of his predecessor.¹¹² It was this disastrous operation that offered a moment for activists to achieve real movement on defeating indefinite disenfranchisement and providing for automatic restoration.

B. The Enactment of Amendment Four

By 2018, Floridians for Fair Democracy had gathered 799,000 signatures, enough to surpass the 766,000 threshold needed to get Amendment Four on the

¹⁰⁵ *Id.* However, this process was still not considered automatic. It still required an approval by the Clemency Board, and thus many of these individuals experienced delays in restoration due bureaucratic backlog. *Id.* at 110–11.

¹⁰⁶ *Id.* at 111.

¹⁰⁷ *Id.*; Fla. R. Exec. Clemency 10(A) (2011). The Clemency Board was made up of Governor and three Cabinet officials. *See* Riggs, *supra* note 99, at 110.

¹⁰⁸ Riggs, *supra* note 99, at 111; *see* Fla. R. Exec. Clemency 9(A) (2011).

¹⁰⁹ Fla. R. Exec. Clemency 14 (2011).

¹¹⁰ Riggs, *supra* note 99, at 111.

¹¹¹ Langston Taylor, *Most Ex-Felons Can Register to Vote Tuesday if All Terms of Their Sentence Are Met*, MIA. HERALD (Jan. 4, 2019, 4:46 PM), <https://www.miamiherald.com/news/politics-government/state-politics/article223934775.html>.

¹¹² 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>.

ballot.¹¹³ After the Florida Supreme Court approved the language, the amendment's text was the following:

(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.¹¹⁴

In short, this Amendment sought to provide individuals with automatic restoration after completion of their sentence, including terms of parole and probation. After appearing on the ballot in the 2018 midterms, the Amendment passed with almost sixty-five percent of the vote—a clear demonstration of the will of the voters.¹¹⁵

After Amendment Four's historic passing, those formerly incarcerated emerged in troves to register to vote, eager to participate in upcoming elections. It is estimated “[n]early 100 times more formerly incarcerated Floridians registered in the first three months of 2019 than in previous odd years,” with more than 2,000 registrations in those three months alone—“that is roughly ten times the *annual* average number of registrations” for those formerly incarcerated prior to Amendment Four's passage.¹¹⁶

C. Senate Bill 7066 and the Institution of a Pay-to-Vote System

Despite this overwhelming victory for restoration, the Florida legislature and Governor DeSantis responded quickly to cull the effects of the Amendment.¹¹⁷

¹¹³ Steven Lemongello, *Floridians Will Vote This Fall on Restoring Rights to Former Felons*, S. FLA. SUN SENTINEL (Jan. 23, 2018, 4:40 PM), <https://www.sun-sentinel.com/news/florida/fl-reg-felon-voters-amendment-20180123-story.html>. Floridians for Fair Democracy was led by Desmond Meade—a former felon himself who earned a law degree after serving his sentence. After achieving this great feat, Meade said: “The moment I found out, tears just started streaming down my face As someone directly impacted, I cannot quantify the level of emotions moving through me right now.” *Id.*

¹¹⁴ *Constitutional Amendment Petition Form*, FLORIDIANS FOR A FAIR DEMOCRACY, INC. (2014), <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/64388-1.pdf>. The italicized portion indicates the text seeking to be added to the Constitution.

¹¹⁵ *Voting Restoration Amendment 14-01*, FLA. DIV. OF ELECTIONS (2018), <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=64388&seqnum=1>.

¹¹⁶ Kevin Morris, *Thwarting Amendment 4*, BRENNAN CTR. FOR JUST. 1–2, 4 (2019), https://www.brennancenter.org/sites/default/files/analysis/2019_05_FloridaAmendment_FINAL-3.pdf.

¹¹⁷ Letter from Ron DeSantis, Governor of Fla., to Laurel Lee, Fla. Sec’y of State (June 28, 2019), <https://www.flgov.com/wp-content/uploads/2019/06/6.282.pdf> (informing Secretary Laurel Lee of the signing of SB 7066 and referring to the passing of Amendment Four as a “mistake”).

SB 7066 was passed and signed into law in late June of 2019.¹¹⁸ The bill aimed to define the “[c]ompletion of all terms of sentence” as put forth in Amendment Four’s text.¹¹⁹ In doing so, the legislature instituted a requirement of “[f]ull payment of fines or fees ordered by the court as a part of the sentence” to become eligible for restoration.¹²⁰ This included restitution (including payments to persons, estates, entities, the state, or the federal government); fees associated with court proceedings (such as investigative and criminal defense costs); and those related to post-incarceration supervision (like parole or probation).¹²¹ Repayment of financial obligations would not be considered satisfied by a “conversion to a civil lien”; thus, even those financial obligations converted to civil judgments have to be repaid before restoration.¹²² Although SB 7066 permits the sentencing court to modify any LFOs, the law does not address the large number of Floridians who face a barrier to restoration due to indigency.¹²³

Having entered into force months after Amendment Four had passed, SB 7066 resulted in a flood of confusion across the state. First, between Amendment Four’s passing in November and SB 7066’s enactment in June, thousands of former felons registered to vote.¹²⁴ After its enactment, all who had previously registered were left in political limbo, unsure if the vote they cast in previous elections counted or if they would face legal recourse for attempting to cast a ballot in the future.¹²⁵ Further complicating the restoration process was the state’s inability to determine the amounts owed.¹²⁶ Despite instituting the requirement of payment, the state had not taken action to create or compile any comprehensive database of repayment amounts.¹²⁷ Various agencies—at both the state and local level—are involved in the recording of fees, including prosecutors, court clerks, and collection agencies.¹²⁸ Each agency utilizes different computer systems or paper files for older cases.¹²⁹ As a result, many

¹¹⁸ *Id.*

¹¹⁹ FLA. STAT. § 98.0751(2)(a) (2020).

¹²⁰ *Id.* at (2)(a)(5).

¹²¹ *Id.* at (2)(a).

¹²² *Id.* at (2)(a)(5)(e)(III).

¹²³ See FLA. STAT. § 98.0751; see also *Raysor* Complaint, *supra* note 1, at 15 (noting SB 7066 does not require modifications to LFOs based on indigency).

¹²⁴ *Morris*, *supra* note 116, at 1.

¹²⁵ See, e.g., *Jones* Consolidated Brief, *supra* note 10, at 13. For example, Curtis Bryant owes approximately \$10,000 in LFOs, for which he makes a monthly payment of \$30 to a debt collector. He was otherwise eligible to vote in two elections after Amendment Four’s passing (a city election in November 2019 and a runoff in December 2019). However, he stated he did not cast a ballot due to fear of prosecution. *Id.*

¹²⁶ See *Gardner & Rozsa*, *supra* note 28.

¹²⁷ *Id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

individuals are left either running “from office to office,” as one former felon put it, or stagnated by fear of criminal prosecution for improper registration.¹³⁰

Currently, even amidst litigation, the state has not implemented any system for local officials or formerly incarcerated individuals to confirm the actual amount owed.¹³¹ The Chief Operating Officer for the Hillsborough County Clerk, Doug Bakke, stated “that he and four employees spent [twelve] to [fifteen] hours” trying to determine what one individual owed, and even then, they were unable to confirm with certainty the exact amount.¹³² The Director of the Florida Division of Elections, Maria Matthews, stated that due to these complications, her office could only process fifty-seven applications from former felons per day.¹³³ At that rate, the Division of Elections would not even begin to make a dent in processing the registrations of the 1.4 million Floridians with felony convictions eligible for re-enfranchisement.¹³⁴

This lack of standardization has led many to face different fates, as county officials have employed their own methods of enforcing SB 7066’s pay-to-vote scheme.¹³⁵ The state has not provided any clarification for these local entities nor have they made the process any easier. Secretary of State Laurel Lee has affirmed that it is the individual’s responsibility to determine if they are eligible to register, and has further stated if they cannot determine this, they should not register.¹³⁶ However, based on the inability of the state to establish a system to verify eligibility to vote or to determine existing LFOs, registering to vote—even for those who may be able to pay off their debts—is insidiously impracticable.

For Ms. Raysor, who was mentioned above, these bureaucratic deficiencies have disastrously complicated any attempt to cast a ballot. Ms. Raysor currently owes \$3,930 in outstanding fees and costs related to prior convictions.¹³⁷ However, Ms. Raysor’s costs arise from both her prior felony conviction as well as two misdemeanor convictions.¹³⁸ She has no method for determining which

¹³⁰ *Id.* (“His enthusiasm [to vote] faded when he realized he could risk a new arrest if he inaccurately swore that he had no court debts. ‘I kind of quit. I don’t want to go to jail for that.’”).

¹³¹ *Id.* (“But 11 months after Gov. Ron DeSantis . . . signed the legislation, and with the fall presidential election inching ever closer, that system still doesn’t exist.”).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Morris, *supra* note 116, at 1.

¹³⁵ See Plaintiffs’ Opening Statement, Jones v. Desantis, 2020 WL 5493770 (2020) (No. 4:19-cv-300-RH/MJF) (on file with Brennan Center for Justice).

¹³⁶ Jones Consolidated Brief, *supra* note 10, at 99.

¹³⁷ *Id.* at 16.

¹³⁸ *Id.*

of these costs are connected solely to her felony conviction.¹³⁹ Thus, costs associated with a misdemeanor conviction may prevent her from exercising her right to vote due to Florida's failure to appropriately administer its own pay-to-vote system.

D. Jones v. DeSantis and Its Appellate History

In light of SB 7066's problematic enactment, Bonnie Raysor, along with others similarly situated, brought a lawsuit in federal court against the Governor, Secretary of State, and the Supervisors of Elections in the plaintiffs' respective counties.¹⁴⁰ The suit challenged the LFO provision of SB 7066, alleging it violated both the U.S. Constitution and the National Voter Registration Act.¹⁴¹

In the District Court for the Northern District of Florida, plaintiffs sought a preliminary injunction to achieve certainty prior to the 2020 Presidential election cycle.¹⁴² At this proceeding, the court acknowledged that the state had the power to deny restoration to certain formerly convicted felons but reaffirmed that these disenfranchisement schemes were still subject to constitutional review.¹⁴³ The district court ultimately concluded that Florida could not "deny an individual plaintiff the right to vote just because the plaintiff lacks the financial resources to pay whatever financial obligations Amendment 4 and SB 7066 require."¹⁴⁴ Thus, the court granted the injunction in part, forbidding the state from preventing any of the seventeen plaintiffs who established a genuine inability to pay from casting a ballot.¹⁴⁵

In February of 2020, the question came before the U.S. Court of Appeals for the Eleventh Circuit for the first time on a motion to stay the district court's preliminary injunction pending appeal.¹⁴⁶ This time, the Eleventh Circuit affirmed the lower court's injunction, agreeing that "[d]enying access to the

¹³⁹ *Id.*

¹⁴⁰ *See Jones v. Governor of Fla.*, 950 F.3d 795, 799 (11th Cir. 2020). Along with the individually named plaintiffs, the case includes several organizational plaintiffs, such as the Florida State Conference of the NAACP, the Orange County Branch of the NAACP, and the League of Women Voters of Florida. *Id.*

¹⁴¹ *Jones Consolidated Brief*, *supra* note 10, at 7. The plaintiffs' constitutional argument was that SB 7066 violated both the Fourteenth Amendment (as an unconstitutional wealth-based discrimination) and the Twenty-fourth Amendment (as a poll tax). *See id.* at 145, 153.

¹⁴² *Jones v. Desantis*, 410 F. Supp. 3d 1284, 1290 (N.D. Fla. 2019).

¹⁴³ *Id.* at 1299.

¹⁴⁴ *Id.* at 1309. The district court added that "[a]ccess to the franchise cannot be made to depend on an individual's financial resources." *Id.* (emphasis omitted) (citing *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1216–17 n.1 (11th Cir. 2005)).

¹⁴⁵ *Id.* at 1310.

¹⁴⁶ *Jones v. Governor of Fla.*, 950 F.3d 795, 800 (11th Cir. 2020).

franchise to those genuinely unable to pay solely on account of wealth does not survive heightened scrutiny.”¹⁴⁷ Thus, the state was still “enjoin[ed] . . . from preventing the plaintiffs from voting based on their genuine inability to pay legal financial obligations.”¹⁴⁸ On May 24, 2020, when the case came back to the district court, the court allowed former felons who demonstrated an inability to pay the right to register and vote.¹⁴⁹ Over a month following the district court decision, the Eleventh Circuit stayed the permanent injunction pending appeal—just “[nineteen] days before the voter registration deadline.”¹⁵⁰ This stay came before the Supreme Court on an application to vacate.¹⁵¹ However, the Supreme Court denied that application, prompting a dissent from Justice Sotomayor, joined by Justice Ginsburg and Justice Kagan.¹⁵²

The state then appealed the permanent injunction, generating the latest iteration in the case’s history thus far—the decision from the Eleventh Circuit delivered on September 11, 2020.¹⁵³ In this ruling, the Eleventh Circuit overturned its past decision on both the preliminary and permanent injunctions, upholding SB 7066 as consistent with the Equal Protection clause.¹⁵⁴ Deciding the district court had wrongfully applied heightened scrutiny, the majority evaluated the law under rational basis review.¹⁵⁵ It determined the right to vote was *not* fundamental as applied to felons.¹⁵⁶ Therefore, to warrant heightened scrutiny, SB 7066 would have to invoke a suspect classification.¹⁵⁷ However, the court held SB 7066 did not employ a suspect class, as “[t]he only classification at issue is between felons who have completed all terms of their sentences, including financial terms, and those who have not.”¹⁵⁸ In the Eleventh Circuit’s view, Florida “withholds the franchise from *any* felon, regardless of wealth, who has failed to complete *any* term of his criminal sentence—financial or otherwise.”¹⁵⁹ On wealth as a suspect classification, it determined Florida’s

¹⁴⁷ *Id.* at 807.

¹⁴⁸ *Id.* at 832–33.

¹⁴⁹ *Jones v. Desantis*, 462 F. Supp. 3d 1196, 1203 (N.D. Fla. 2020).

¹⁵⁰ *Raysor v. Desantis*, 140 S. Ct. 2600, 2602 (2020) (Sotomayor, J., dissenting).

¹⁵¹ *Id.* at 2600.

¹⁵² *Id.*

¹⁵³ *Jones v. Governor of Fla.*, 975 F.3d 1016, 1028 (11th Cir. 2020) (en banc).

¹⁵⁴ *Id.* at 1025.

¹⁵⁵ *Id.* at 1030.

¹⁵⁶ *Id.* at 1029 (“Whatever may be true of the right to vote generally, felons ‘cannot complain about the loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted under the terms of *Richardson*.’” (quoting *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010))).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1030.

pay-to-vote scheme did not invoke any of the “narrow circumstances” permitting laws “burden[ing] the indigent” to be reviewed under heightened scrutiny.¹⁶⁰

After determining the law was subject to rational basis review, the Eleventh Circuit upheld it as rationally related to a legitimate government interest.¹⁶¹ First, the legitimate government interests noted were the state’s interest “in disenfranchising convicted felons” and restoring rights to those who had completed their term as a form of rehabilitation.¹⁶² Conversely, one dissenter viewed Florida’s interests as more focused on debt collection and punishment.¹⁶³ Second, the means chosen—conditioning re-enfranchisement on payment—were determined to be related to these interests as “[t]he people of Florida could rationally conclude that felons who have completed all terms of their sentences, including [payment] . . . are more likely to responsibly exercise” the right to vote.¹⁶⁴ Ultimately, the Eleventh Circuit claimed it did not matter that the classification is “based on rational speculation unsupported by the evidence”¹⁶⁵ or that the law “appears to discriminate irrationally.”¹⁶⁶

As discussed in the next part, this opinion failed to correctly categorize the suspect class relevant in this case. Even if the court’s classification was correct, the law would fall into the narrow circumstances burdening indigent defendants, requiring heightened scrutiny. The apparent mistakes of the *Jones* decision illuminate the need for a new precedent to eradicate poverty-based punishments, especially those which burden a fundamental right.

IV. THE ELEVENTH CIRCUIT GOT IT WRONG IN *JONES*

The Eleventh Circuit’s en banc decision, authored by Judge William Pryor, upheld the Florida law in a divided vote.¹⁶⁷ This Part argues the majority erred both by (A) employing the wrong classification when deciding the proper level of scrutiny, and (B) ignoring the ripe Supreme Court jurisprudence regarding both indigent defendants and the fundamental nature of the right to vote irrespective of one’s prior convictions. Lastly, this Part concludes by arguing why such corrections by the *Jones* court would not have been enough to truly

¹⁶⁰ *Id.*

¹⁶¹ *See id.* at 1034.

¹⁶² *Id.*

¹⁶³ *Id.* at 1085–86 (Jordan, J., dissenting).

¹⁶⁴ *Id.* at 1035 (majority opinion).

¹⁶⁵ *Id.* at 1036 (quoting *FCC v. Beach Commc’ns*, 508 U.S. 307, 315 (1993)).

¹⁶⁶ *Id.* (quoting *In re Wood*, 866 F.2d 1367, 1370 (11th Cir. 1989)).

¹⁶⁷ *See id.*

prevent payment-based restoration schemes from infecting the democratic process.

A. The Eleventh Circuit Employed the Wrong Classifications Invoked by SB 7066

First, the Eleventh Circuit employed the wrong classification to determine the proper level of scrutiny. Under the Fourteenth Amendment's Equal Protection guarantee, "classifications that neither implicate fundamental rights nor proceed along suspect lines are subject to rational basis review."¹⁶⁸ To prompt heightened scrutiny, there are two potential avenues: (1) invoking a fundamental right or (2) identifying a suspect class.¹⁶⁹ The *Jones* majority wrongfully stifled the plaintiffs' arguments for pursuing both avenues by erroneously claiming "[s]tates may restrict voting by felons in ways that would be impermissible for other citizens."¹⁷⁰ Although states may "make classifications in law when such classifications are rooted in reason," they cannot employ "differentiations . . . that have no relation to a rational policy . . . or authorize[] the imposition of conditions that offend the deepest presuppositions of our society."¹⁷¹ Simply, states "can no more discriminate on account of poverty than on account of religion, race, or color."¹⁷² There is no asterisk in the Fourteenth Amendment permitting discrimination—based on poverty or race—as long as an individual has a felony conviction.

The majority acknowledged the Fourteenth Amendment's prohibition but still concluded that "laws that govern felon disenfranchisement . . . are subject to rational basis review."¹⁷³ It offered the classification at hand was not one invoking an ability to pay, but rather, "[was] between felons who have completed all terms of their sentences, including financial terms, and those who have not."¹⁷⁴ This classification ultimately ignores SB 7066's clear implication of exacting a payment as conditional for regaining the right to vote. Under constitutional review, statutes need not only be considered facially, but can also

¹⁶⁸ *Id.* at 1029.

¹⁶⁹ *See id.*

¹⁷⁰ *Id.*

¹⁷¹ *Griffin v. Illinois*, 351 U.S. 12, 21–22 (1956) (Frankfurter, J., concurring).

¹⁷² *Id.* at 17 (plurality opinion).

¹⁷³ *Jones*, 975 F.3d at 1030 ("Although States enjoy significant discretion in distributing the franchise to felons, it is not unfettered. A State may not rely on suspect classifications in this area any more than in other areas of legislation.")

¹⁷⁴ *Id.* at 1029.

be considered for their effects.¹⁷⁵ In fact, the U.S. Supreme Court clarified this point previously:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.¹⁷⁶

SB 7066 cannot be evaluated solely based upon its facial language and must be judged by its unequal hand. Accordingly, the majority cannot determine the classification invoked by the law solely based on its textual propositions. It must acknowledge the classification the law implicates through its operation and subsequent burdens. On its face, SB 7066 does state that *all* felons must complete terms of sentences, including payment to obtain re-enfranchisement.¹⁷⁷ However, SB 7066 effectively prevents restoration for only those who are genuinely unable to pay. The Supreme Court has recognized a similar premise, noting those sanctions that are “wholly contingent on one’s ability to pay, and thus ‘visit different consequences on two categories of persons’ . . . [and] apply to all indigents and do not reach anyone outside that class.”¹⁷⁸ Judge Adalberto Jordan’s dissent in *Jones* argued for a similar premise, realizing “heightened scrutiny applies here because the LFO requirement results in an absolute deprivation of the right to vote for felons in any elections that take place while they are indigent.”¹⁷⁹

Accordingly, to adhere to Supreme Court precedent, the Eleventh Circuit majority in *Jones* should have recognized the distinction inherent in SB 7066’s operation between those with a genuine inability to pay and those able to pay. Government agencies routinely delineate such categorizations when determining indigency both within the criminal justice system, when appointing a public defender¹⁸⁰ or waiving fees for transcript copies,¹⁸¹ as well as outside

¹⁷⁵ *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

¹⁷⁶ *Id.*

¹⁷⁷ FLA. STAT. § 98.0751 (2020).

¹⁷⁸ *M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996)

¹⁷⁹ *Jones*, 975 F.3d at 1075 (Jordan, J., dissenting).

¹⁸⁰ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

¹⁸¹ *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) (stating Illinois could not “shut off means of appellate review for indigent defendants”). For example, Florida permits an individual to file an application for determination of civil indigent status. *See* FLA. STAT. § 57.081 (2020). If the application is accepted, the applicant can receive services such as “filing fees; service of process; certified copies of orders or final judgments; a single photocopy of any court pleading, record, or instrument” despite a present inability to pay. *Id.* To determine indigency, Florida considers one’s net income, as well as other income such as social

of the criminal justice system, when considering filing fees for political candidacy.¹⁸² However, such a mechanism to determine indigency has not been incorporated in SB 7066's requirement for full payment of LFOs. The current system not only permits voter eligibility to be determined based upon affluence, but also allows access to the franchise to be dependent upon the ability to pay.¹⁸³ The majority opinion in *Jones* continued, noting SB 7066's "requirement that felons complete their sentences applies regardless of race, religion, or national origin," and accordingly does not affect a suspect class.¹⁸⁴ Although poverty alone has not been regarded as "suspect," the Supreme Court has made it quite clear—states cannot draw lines on the basis of one's wealth in terms of access to proceedings for indigent defendants¹⁸⁵ nor in determining access to the franchise.¹⁸⁶

B. The Eleventh Circuit Erroneously Applied Precedent

Even assuming the Eleventh Circuit utilized the proper classification, the Florida scheme would still call for a heightened level of scrutiny under current precedent. The statute would easily fall within two exceptions to rational basis review provided in *M.L.B. v. S.L.J.* that apply when evaluating laws that burden indigent defendants—a notion the majority in *Jones* rejected outright.¹⁸⁷ *M.L.B.* concerned a challenge to a Mississippi law that required payment of record preparation fees when appealing one's termination of parental rights.¹⁸⁸ Recognizing the quasi-judicial nature of parental rights proceedings and the fundamental nature of one's parental rights, the Court carved out two exceptions

security benefits, assets, liabilities, and debts. See FLA. STAT. § 57.085 (2020).

¹⁸² *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (“[W]e note that there are obvious and well known means of testing the ‘seriousness’ of a candidacy . . . [apart from] the neutral . . . payment of a filing fee.”).

¹⁸³ FLA. STAT. § 98.0751(2)(a)(5) (2020).

¹⁸⁴ *Jones*, 975 F.3d at 1030.

¹⁸⁵ See *infra* Part V.A; see also *Griffin*, 351 U.S. at 19 (plurality opinion) (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”); *Douglas v. California*, 372 U.S. 353, 357–58 (1963) (“There is lacking that equality demanded by the Fourteenth Amendment” when “the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot.”); *M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996) (“Sanctions . . . like the Mississippi prescription here at issue are not merely *disproportionate* in impact. Rather, they are wholly contingent on one’s ability to pay, and thus ‘visit different consequences on two categories of persons.’” (quoting *Williams v. Illinois*, 399 U.S. 235, 242 (1970))).

¹⁸⁶ See *infra* Part IV.B; see also *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (“[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.”); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005) (“Access to the franchise cannot be made to depend on an individual’s financial resources.”).

¹⁸⁷ *Jones*, 975 F.3d at 1032 (en banc) (“[*M.L.B.*] represent[s] limited exceptions to the general rule that rational basis review applies to claims of wealth discrimination. They do not apply here.” (citation omitted)).

¹⁸⁸ *M.L.B.*, 519 U.S. at 106.

for wealth-based discrimination to prompt heightened scrutiny.¹⁸⁹ (1) “[t]he basic right to participate in political processes as voters and candidates” and (2) “access to judicial processes in cases criminal or ‘quasi-criminal in nature.’”¹⁹⁰ In both of these circumstances, there is one clear prohibition—access may *not* turn on the ability to pay.¹⁹¹

Contrary to the holding in *Jones v. Governor of Florida*, Florida’s rights restoration scheme and those which similarly require full payment of LFOs before achieving re-enfranchisement fall within the exceptions the Supreme Court established in *M.L.B.*—a conclusion that did not evade Judge Beverly Martin in her dissent.¹⁹² Pay-to-vote rights’ restoration statutes violate both of *M.L.B.*’s prohibitions on laws that condition payment on (1) the basic right to participate in political processes as voters and (2) judicial processes which are criminal or quasi-criminal.¹⁹³

First, conditioning access to the franchise for indigent former felons on payment of all LFOs is squarely the case *M.L.B.* sought to address.¹⁹⁴ One of the cases that *M.L.B.* referred to as a reflection of this principle is *Lubin v. Panish*, decided in 1977.¹⁹⁵ *Lubin* involved a California law that necessitated payment of a ballot-access fee, with no alternatives to get one’s name on the ballot.¹⁹⁶ Facing a challenge by an indigent person who was unable to pay this filing fee, the Supreme Court struck down the law as a violation of the Equal Protection Clause, affirming that “a [s]tate may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay.”¹⁹⁷ Although *Lubin* affected the candidate-side of the ballot, *M.L.B.* clarified this prohibition applies to candidates and voters alike.¹⁹⁸ Similar to *Lubin*, the state cannot require an indigent former felon to pay fees he cannot afford to achieve access to the political process with no adequate alternative paths to meaningfully participate.¹⁹⁹

¹⁸⁹ *Id.* at 124.

¹⁹⁰ *Id.* (citation omitted).

¹⁹¹ *Id.*

¹⁹² *Jones*, 975 F.3d at 1076 (Martin, J., dissenting). This dissent was joined by Judges Charles Wilson, Adalberto Jordan, and Jill Pryor.

¹⁹³ See *M.L.B.*, 519 U.S. at 124.

¹⁹⁴ *Id.* (“This basic right to participate in the political processes as voters . . . cannot be limited to those who can pay . . .”).

¹⁹⁵ *Id.* at 124 n.14.

¹⁹⁶ *Lubin v. Panish*, 415 U.S. 709, 710 (1974).

¹⁹⁷ *Id.* at 718.

¹⁹⁸ *M.L.B.*, 519 U.S. at 124.

¹⁹⁹ *Id.* at 124 n.14 (“[V]oting cannot hinge on ability to pay . . . , for it is a ‘fundamental political right . . . preservative of all rights.’” (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886))).

Second, Florida's process for restoration can also fall within the second exception prescribed by *M.L.B.*—access to proceedings “criminal or ‘quasi criminal in nature.’”²⁰⁰ In such cases, “state[s] may not ‘bolt the door to equal justice’” as “[s]anctions . . . wholly contingent on one’s ability to pay” are impermissible.²⁰¹ As discussed fully in Part IV.A, the State of Florida has conceded the full payment of LFOs and its subsequent bar to restoration are levied for the purposes of punishment to ensure a defendant fully pays their debt to society before obtaining reintegration.²⁰²

Irrespective of whether the Eleventh Circuit employed the proper level of scrutiny or whether one of the two *M.L.B.* exceptions can be applied to SB 7066, the same conclusion remains: the law should be held to heightened scrutiny either through current precedent or a new era of jurisprudence. If so, Florida's scheme and those similarly enacted would fail as “[t]he [s]tate’s pocketbook interest in advance payment . . . [is] unimpressive when measured against the stakes” for these indigent former felons.²⁰³ Felony disenfranchisement’s “long history, . . . predat[ing] the founding of the Republic”²⁰⁴ should not insulate it from constitutional review, especially when it has mutated into another tool to criminalize those in poverty.²⁰⁵ Accordingly, as explained in Part V, the Eleventh Circuit’s decision in *Jones* emphasizes the need for a new era of wealth-based disenfranchisement jurisprudence.

C. *Current Precedent Is Not Enough*

Even if the Eleventh Circuit had correctly employed its past precedent, current jurisprudence is not sufficient to address pay-to-vote systems operating within Florida and throughout the country.²⁰⁶ Conditioning rights restoration upon payment is merely one symptom of a much larger disease in which state legislatures attempt to enact indefinite deprivations as a form of punishment.²⁰⁷

²⁰⁰ *Id.* at 124 (quoting *Mayer v. Chicago*, 404 U.S. 189, 196 (1971)).

²⁰¹ *Id.* at 124, 127 (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring)).

²⁰² *See supra* Part IV.A.

²⁰³ *M.L.B.*, 519 U.S. at 121.

²⁰⁴ *Jones v. Governor of Fla.*, 975 F.3d 1016, 1028 (11th Cir. 2020) (en banc). Felony disenfranchisement’s longstanding history is succinctly one of the main reasons why such mechanisms should not stand. *See generally* Figler, *supra* note 73, at 724 (describing the use of disenfranchisement laws in the Jim Crow Era and the racial motivations driving felony disenfranchisement).

²⁰⁵ *Jones*, 975 F.3d at 1028.

²⁰⁶ *See supra* note 76 and accompanying text (discussing state systems that sanction indefinite disenfranchisement due to non-payment of LFOs).

²⁰⁷ *See Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010); TENN. CODE ANN. § 40-29-202 (2020) (preventing rights restoration due to nonpayment of child support, which is a legal financial obligation outside of one’s term of sentence).

As discussed next, the Supreme Court precedent established in *Richardson v. Ramirez* has allowed state legislatures to avoid constitutional challenges by embedding their restoration schemes within disenfranchisement to fall squarely within *Richardson's* protection.²⁰⁸ However, systems such as Florida's are not solely about removing one's voting rights upon felony conviction, but also about indefinitely shutting individuals out from the democratic process. Based upon the insistence of state legislatures to circumvent the current legal framework by re-framing, a new precedent is required if the unconstitutional nature of these laws is to be addressed.

The Eleventh Circuit in *Jones* insisted that any challenge to Florida's felony disenfranchisement law would be doomed under the Supreme Court precedent established in *Richardson v. Ramirez*.²⁰⁹ In *Richardson*, the Supreme Court reviewed a California law that authorized disenfranchisement for those convicted of a felony based upon an Equal Protection claim.²¹⁰ In its opinion, the Supreme Court referenced the less-cited Section 2 of the Fourteenth Amendment, which includes the following:

But when the right to vote at any election for the choice of electors . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime.*²¹¹

The Supreme Court interpreted this to provide an exception for felony disenfranchisement laws from the Fourteenth Amendment's progeny, explaining the section's legislative history clarifies the intention of lawmakers to exempt disenfranchisement on the basis of a felony conviction.²¹² Ultimately, *Richardson* allowed felony disenfranchisement laws to be distinguished from the standard equal protection analysis involving a fundamental right, permitting

²⁰⁸ *Richardson v. Ramirez*, 418 U.S. 24 (1974)

²⁰⁹ *See Jones*, 975 F.3d at 1030. The court added that “[w]hatever may be true of the right to vote generally, felons ‘cannot complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted under the terms of *Richardson*.’” *Id.* at 1029 (quoting *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010)).

²¹⁰ *Richardson*, 418 U.S. at 27–28 (“[N]o person convicted of any infamous crime, no person hereafter convicted of the embezzlement or misappropriation of public money . . . shall ever exercise the privileges of an elector in this State.”). The California Elections Code went on to posit in Sections 310 and 321 that “an affidavit of registration shall show whether the affiant has been convicted of ‘a felony which disqualifies [him] from voting.’” *Id.* at 28.

²¹¹ *Id.* at 42 (emphasis added) (quoting U.S. CONST. amend. XIV).

²¹² *See id.* at 43 (“[W]hat legislative history there is indicates that this language was intended by Congress to mean what it says.”). The Court notes there were no changes made on the House floor to edit the language of the section and highlights several quotations from the floor in which lawmakers speak to this crime-based exception. *Id.* at 43–48.

a rational basis review despite burdens upon the right to vote.²¹³ The Court's holding in *Richardson* was solely that felony disenfranchisement falls under the protection of the Fourteenth Amendment, prompting rational basis of disenfranchisement laws.²¹⁴ Although the Fourteenth Amendment's language does not particularly preclude restoration schemes based upon discriminatory lines which would normally provoke heightened scrutiny,²¹⁵ many circuits have failed to ascertain such a distinction.²¹⁶

Even if the courts struck down such laws under current precedent, state legislatures will phrase their laws upon disenfranchisement to remain within the wide berth of *Richardson*'s interpretation of the Fourteenth Amendment. Thus, a new jurisprudence squarely aimed at review of restoration frameworks—particularly those which allow those with means to get their voting rights back while leaving those without excluded from the ballot box every election—must be established by the Supreme Court to form a cohesive body of precedent for the circuits to apply.

V. A NEW APPROACH TO REVIEWING PAY-TO-VOTE RESTORATION LAWS

The same criminal justice system that provides counsel for indigent defendants allows fees for these services levied on the back-end to relegate these individuals to a second-class citizenship, devoid of the most sacred of our rights—the right to vote.²¹⁷ Due to the intent to criminalize poverty, pay-to-vote felony restoration laws should be evaluated by the Supreme Court's ripe jurisprudence concerning wealth-based discrimination both within the criminal justice system and within access to the franchise. This Part argues that, to

²¹³ *See id.*

²¹⁴ *See id.* at 54 (exempting felony disenfranchisement from previous “state-imposed restrictions on the franchise” where the court applied heightened scrutiny).

²¹⁵ *See* U.S. CONST. amend. XIV; *see also* *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (“The law . . . administered by public authority with an evil eye and unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is . . . within the prohibition of the Constitution.”).

²¹⁶ *See* *Johnson v. Bredeesen*, 624 F.3d 742, 746 (6th Cir. 2010) (holding former felons had no “fundamental interest to assert” a challenge to Tennessee’s restoration system because the law stripping away their voting rights was constitutional under *Richardson*); *see also* *Jones v. Governor of Fla.*, 975 F.3d 1016, 1029 (11th Cir. 2020) (en banc) (upholding the Florida restoration law based upon the notion that *Richardson* expressly permitted felony disenfranchisement); *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978) (upholding a Texas law that distinguished between federal and state convictions for enfranchisement based upon *Richardson*'s holding that Section 2 of the Fourteenth Amendment is an “express approval” of the state’s power to both disenfranchise and re-enfranchise former felons).

²¹⁷ *See* *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . .”).

eradicate laws that aim to punish on account of one's poverty, a new constitutional jurisprudence prompting heightened scrutiny is required.

Section A discusses the Supreme Court's wealth discrimination jurisprudence within the criminal justice system, arguing that payment-based restoration often operates to levy indefinite financial burdens as a form of punishment and prohibits reintegration for many years after terms of incarceration. Next, section B examines a similar line of cases within the political process in which the Court has rejected wealth-based burdens upon access to the franchise. Relying upon both these lines of case law, section C calls for a new standard, uniting this precedent to propose a new framework to review efforts to criminalize one's poverty apart from mere confinement to ensure all have access to every privilege of their citizenship, regardless of financial status.

A. Wealth Discrimination in the Criminal Justice System

Through conditioning restoration on payment, the state exacts a near indefinite punishment based upon ability to pay. Thus, these laws implicate the Supreme Court's line of cases regarding wealth distinctions in the criminal justice system.

Foundational to wealth discrimination jurisprudence is the Supreme Court's decision in *Griffin v. Illinois*.²¹⁸ Decided in 1956, *Griffin* involved a challenge to an Illinois law that required defendants to "furnish the appellate court with a bill of exceptions or report of proceedings at the trial" to file an appeal of their conviction for writs of error.²¹⁹ Both requirements were nearly impossible to supply without paying the cost of "a stenographic transcript of the . . . proceedings."²²⁰ In homicide cases, these costs were waived; however, in all other criminal cases, defendants were required to purchase it—erecting a barrier between indigent defendants and the right to an appeal.²²¹

Faced with a question of constitutionality, the Supreme Court held that the Illinois law established a system in which some were too poor to appeal, violating the Equal Protection Clause by allowing "the kind of a trial a man gets" to depend "on the amount of money he has."²²² Although the state was not required to offer this right to an appeal, once established, it could not offer it "in

²¹⁸ *Griffin v. Illinois*, 351 U.S. 12 (1956) (plurality opinion).

²¹⁹ *Id.* at 13.

²²⁰ *Id.* at 13–14.

²²¹ *Id.* at 14.

²²² *Id.* at 19.

a way that discriminate[d] against some convicted defendants on account of their poverty.”²²³ The Court prescribed that distinctions made along poverty lines are akin to those distinctions made “on account of religion, race, or color” as “the ability to pay costs . . . [bore] no rational relationship” to the deprivation of rights.²²⁴ Thus, the Court established the standard that all “ought to obtain right and justice freely, and without being obligated to purchase it, completely.”²²⁵

The right to an appeal is not the only context in which the Court has decided states cannot “draw a line . . . preclud[ing] convicted indigent persons . . . from securing such a review.”²²⁶ Relying upon its progeny in *Griffin*, the Court similarly refused to uphold another Illinois law that drew a distinction based on wealth in *Williams v. Illinois*.²²⁷ Considering “whether an indigent may be continued in confinement beyond the maximum term specified . . . because of his failure to satisfy the monetary provisions of the sentence,” the Court held that imprisonment resulting “directly from an involuntary nonpayment of a fine or court costs [is] . . . an impermissible discrimination that rests on ability to pay.”²²⁸ Accordingly, *Williams* expanded the notion that began in *Griffin* to then prohibit the State from subjecting defendants to further punishment “solely because they are too poor to pay the fine”—a key prohibition when preventing restoration based upon inability to pay.²²⁹

Lastly, *Bearden v. Georgia* provides the final nail in the coffin, as the Supreme Court again rejected wealth-based distinctions in relation to criminal defendants. In *Bearden*, the Court considered “whether a sentencing court [could] revoke a defendant’s probation for failure to pay the imposed fine and restitution.”²³⁰ The Court held that a revocation based upon a genuine inability to pay was unconstitutional as contrary to the Fourteenth Amendment’s guarantee of fundamental fairness.²³¹ The majority rejected the state’s

²²³ *Id.* at 18.

²²⁴ *Id.* at 17–18.

²²⁵ *Id.* at 18. (quoting ILL. CONST. of 1818, art. VIII, § 12).

²²⁶ *Id.* at 23 (Frankfurter, J., concurring).

²²⁷ *Williams v. Illinois*, 399 U.S. 235, 241 (1970) (“Applying the teaching of the *Griffin* case here, we conclude that an indigent criminal defendant may not be imprisoned in default of payment of a fine . . .”).

²²⁸ *Id.* at 236, 240–41. Here, the State’s interest in collecting payment for both fines and court costs was not significant enough to permit the distinction. *See id.* at 240–41.

²²⁹ *Bearden v. Georgia*, 461 U.S. 660, 664 (1983) (discussing the precedent established in *Williams*). This prohibition of extending confinement based on inability to pay was further expanded in *Tate v. Short*, where the Court held the State could not convert fines into jail time based on an inability to pay. *See* 401 U.S. 395, 398 (1971) (adopting the view of four members of the Court in *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970)).

²³⁰ *Bearden*, 461 U.S. at 665.

²³¹ *Id.* at 672–73. Justice O’Connor’s opinion stressed this must be a genuine inability to pay, meaning the probationer “made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of

arguments regarding their interest in ensuring restitution be paid to victims and their interest in protecting society by removing the defendant to ensure he will not continue to commit crimes.²³² Crucial to this rejection was the acknowledgment that “poverty by itself” will not “indicat[e] [the defendant] may commit crimes in the future.”²³³ Permitting revocation of probation for failure to a pay would “be little more than punishing a person for his poverty.”²³⁴ The combination of Supreme Court jurisprudence within this area, therefore, provides one conclusion—an individual cannot be indefinitely punished due to their poverty.

Regardless of the form of punishment, *Griffin* has established that “the ability to pay costs . . . bears no rational relationship” to the deprivation of a fundamental right.²³⁵ When the right invoked is one of freedom to participate fully in the political process, a former felon’s financial status will not demonstrate “danger[],” a “need[] . . . to be incapacitated,” or a need to exclude from the voting booth.²³⁶ Every election that passes can be seen as an extension of a sentence akin to *Williams*, as every election that passes exacts another irreparable harm.

Based upon this, Florida’s felony restoration scheme and those comparably requiring full payment before enfranchisement should be regarded as akin to the punishments unduly enacted in *Griffin*, *Williams*, and *Bearden*. Florida conceded in *Jones* that it views SB 7066’s disenfranchisement as a form of punishment.²³⁷ Moreover, the Fourteenth Amendment’s rarely cited Section 2 refers to disenfranchisement as a punishment for a felony.²³⁸ Thus, disenfranchisement exacted upon a former defendant regardless of a genuine inability of pay is the primary action the Court has sought to prohibit—indefinite punishment levied solely because an individual is too poor to pay the price. Accordingly, “*Griffin*’s principle has not been confined to cases in which imprisonment is at stake.”²³⁹ Accordingly, imprisonment cannot be seen as the sole case in which we reject these wealth-based distinctions, exemplifying the

his own.” *Id.* at 668.

²³² *Id.* at 671.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (plurality opinion).

²³⁶ *Bearden*, 461 U.S. at 671.

²³⁷ See State Defendants Brief on Appeal, *supra* note 32, at 25 (arguing that *Bearden* acknowledges the State’s interest in punishing persons both rich and poor).

²³⁸ U.S. CONST. amend. XIV, § 2.

²³⁹ *M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996).

need for a new form of heightened scrutiny to account for such non-carceral punishments.

Despite the precedent established by these cases, poverty is still the defining factor when it comes to access to the franchise for former felons as payment-based punishments loom following a conviction. In 1962, the Supreme Court in *Gideon v. Wainwright* proscribed “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”²⁴⁰ *Gideon*’s promise was hailed as monumental in ushering in a new era of jurisprudence to aid the disadvantaged.²⁴¹ However, this new era cannot be achieved if the costs are levied on the latter end, allowing for fines and fees associated with the defendant’s guarantee of a fair trial to be prohibitory as those formerly convicted attempt to move past their prior sentences.

For example, Bonnie Raysor’s previously mentioned legal financial obligations—which she will not be able to pay off until 2031—result from “court costs, [the] cost of prosecution, . . . [the] cost of investigation, [a] public defender application fee, and [a] public defender fee.”²⁴² On average in Florida, these court related costs amount to \$475, including \$50 for an application for a public defender, “\$100 for actual representation by [that] public defender,” \$100 minimum for the state’s attorney, and “\$225 as ‘additional court costs.’”²⁴³ Ms. Raysor is not alone. Judge Jordan’s dissent further noted that at the trial level of *Jones*, the district court found “[seventy percent] of those felons who had completed their sentences (except for the payment of LFOs) were represented by a public defender,” indicating their indigency.²⁴⁴ If the criminal justice system is ever to fully eradicate the criminalization of poverty rife within its ranks and truly fulfill *Gideon*’s promise, it must first seek to prohibit payment-based punishment within rights restoration.

B. *Wealth Discrimination in Access to the Franchise*

The right to vote has consistently been reaffirmed as fundamental to the functioning of a healthy democracy.²⁴⁵ As early as 1886, the Supreme Court

²⁴⁰ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

²⁴¹ Abe Krash, *Right to a Lawyer: The Implication of Gideon v. Wainwright*, 39 NOTRE DAME L. REV. 150, 159–60 (1964). Author Abe Krash assisted Abe Fortas, who was appointed by the Supreme Court to represent Mr. Gideon, the landmark decision’s namesake, in preparation of the brief for the case. *Id.* at 150 (about the author).

²⁴² See Raysor Complaint, *supra* note 1, at 7.

²⁴³ *Jones v. DeSantis*, 410 F. Supp. 3d 1284, 1297 (N.D. Fla. 2019).

²⁴⁴ *Jones v. Governor of Fla.*, 975 F.3d 1016, 1067 (11th Cir. 2020) (en banc) (Jordan, J., dissenting).

²⁴⁵ *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

proudly asserted this notion, stating the right to vote “is regarded as a fundamental political right, because [it is] preservative of all rights.”²⁴⁶ Since “the right to vote is too precious, too fundamental to be so burdened or conditioned,” any infringements are generally disfavored.²⁴⁷ Such disfavor extends to several forms of discrimination even if the lines are drawn amongst race or wealth classifications.²⁴⁸

Despite this, the majority in *Jones v. Governor of Florida* contended the jurisprudence regarding the right to vote as fundamental was inapplicable to SB 7066 and its operation, posing that *Richardson* provided felons were not entitled such access to this fundamental right.²⁴⁹ However, as discussed prior, *Richardson* merely upheld a California law disenfranchising felons, offering that the Fourteenth Amendment condoned such disenfranchisement laws.²⁵⁰ It did not explicitly strip away the fundamental nature of the restoration of those voting rights for so many Americans nor did it permit discrimination within restoration.²⁵¹ Accordingly, pay-to-vote restoration laws like Florida’s should not only be viewed in light of the Court’s prohibition on wealth-based discrimination in the criminal justice sphere, but also in light of the longstanding prohibition on affluence-related prerequisites to vote as embodied by the Court in *Harper v. Virginia Board of Education*.²⁵²

Harper involved a Virginia law that required all residents to pay a \$1.50 tax six months prior to any election as a precondition for casting their ballot.²⁵³ To register, a person had to pay the tax for three years before filing an application of voter registration.²⁵⁴ The Supreme Court struck down the law, acknowledging the vein of jurisprudence flowing from *Griffin*, and held that the “requirement of fee paying causes an ‘invidious’ discrimination that runs afoul of the Equal Protection Clause.”²⁵⁵ Although endowed with the ability to affix reasonable voter qualifications, any requirements related to the affluence of the voter cannot

²⁴⁶ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

²⁴⁷ *Harper v. Va. Bd. of Educ.*, 383 U.S. 663, 670 (1966).

²⁴⁸ *Id.* at 668 (“Lines drawn on the basis of wealth or property like those of race, are traditionally disfavored.”).

²⁴⁹ *Jones*, 975 F.3d at 1029.

²⁵⁰ *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

²⁵¹ *Id.* at 56; *see also Jones*, 975 F.3d at 1059 (Martin, J., dissenting) (noting the Supreme Court in *Richardson* “held that the Fourteenth Amendment condone[d] felony disenfranchisement” but did not “tell [the Court] what to do once the State Legislature . . . adopts a scheme to restore the fundamental right to vote” to former felons).

²⁵² *Harper v. Va. Bd. of Educ.*, 383 U.S. 663 (1966).

²⁵³ *Id.* at 664 n.1.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 668 (citation omitted) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541(1942)).

be considered as such.²⁵⁶ Despite pay-to-vote laws being “an old familiar form of taxation,” such payment-based prerequisites were indefinitely prohibited.²⁵⁷

Ultimately, Florida’s restoration scheme is the exact thing *Harper* prohibits—“wealth or payment of a fee as a measure of a voter’s qualifications.”²⁵⁸ By explicitly disavowing registration until full payment is received, SB 7066 is no different than the Virginia law in *Harper* requiring a tax three years prior to registration. Although SB 7066’s required payment of LFOs is levied upon felons as distinct from all voters, it still places wealth at the center of its operation. *Harper* explicitly pronounced that wealth or payment of a fee does not indicate a “responsibl[e] exercise [of] the franchise” nor are those with the ability to pay more “deserving,”²⁵⁹ realizing that “[w]ealth . . . is not germane to one’s ability to participate intelligently in the electoral process.”²⁶⁰

The Eleventh Circuit applied this provision to a previous iteration of Florida’s felony disenfranchisement in *Johnson v. Governor of Florida*, citing to *Harper* when writing that “[a]ccess to the franchise cannot be made to depend on an individual’s financial resources.”²⁶¹ The Court noted that it need not address that aspect of the petitioner’s claim as Florida’s system at the time “[did] not deny access to the restoration of the franchise based on ability to pay.”²⁶² Since *Johnson*, the Florida legislature has expressly conditioned restoration on one’s ability to pay LFOs.²⁶³ As a result, the law must now serve as an example of how the state should be constitutionally prohibited from designing rights restoration laws precisely upon wealth-based distinctions due to the convergence of criminal punishment and access to one’s fundamental rights.

C. *Uniting for a New Standard for Review*

As noted earlier, laws employing poverty-based distinctions are not new phenomena.²⁶⁴ Rather, the criminal justice system has been constructed upon

²⁵⁶ *Id.* (“Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.”).

²⁵⁷ *Id.* at 669.

²⁵⁸ *Id.* at 668.

²⁵⁹ *Jones v. Governor of Fla.*, 975 F.3d 1016, 1035 (11th Cir. 2020) (en banc).

²⁶⁰ *Harper*, 383 U.S. at 668.

²⁶¹ *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005). Here, the court declined to expressly rule upon “whether conditioning an application for [enfranchisement] on paying restitution would be” an “invidious discrimination,” as Florida’s previous system did not condition rights restoration on payment. *Id.* at 1217 n.1, 1238 n.7.

²⁶² *Id.* at 1217 n.1.

²⁶³ FLA. STAT. § 98.0751(2)(a) (2020).

²⁶⁴ *See supra* Part I.A.

these distinctions, permitting the criminalization of poverty by levying LFOs and then exacting punishment for nonpayment years after one's term of confinement or supervision may have ended.²⁶⁵ Florida's payment-based felony disenfranchisement is one key example of this construction. Here, fundamental rights and criminalization unite, prompting the need for a new standard to address wealth-based punishments outside of confinement to ensure *all* have access to the full extent of citizenship.

Similar to how *Griffin*'s principles arose from a convergence of both equal protection and due process,²⁶⁶ a new standard should join the jurisprudence arising from *Griffin* and *Harper*.²⁶⁷ Combining the respective progeny would establish heightened scrutiny as the proper review for wealth-based criminal punishments that burden fundamental rights.²⁶⁸ This convergence employs the due process review of "fairness of relations between the criminal defendant and the State under the Due Process Clause" and "the question [of] whether the State has invidiously denied . . . a substantial benefit available to another . . . under the Equal Protection Clause."²⁶⁹ *Griffin* has made clear that no one should be obligated to purchase access to their rights.²⁷⁰ Its holding has extended past confinement-based punishments previously²⁷¹ and may not be narrowed to "easy slogans or a pigeonhole analysis."²⁷² Rather, such a system would embody a similar vein as *M.L.B. v. S.L.J.*, recognizing that although states need not account for all disparities, there must be greater scrutiny of laws which permit deprivation of fundamental rights—such as the franchise—to turn on one's ability to pay.²⁷³

The "passage of time has heightened rather than weakened" the need to "mitigate . . . disparate treatment of indigents in the criminal process."²⁷⁴ Thus, the time must come for the Supreme Court to address these restoration frameworks, as Florida is not the only state permitting payment to punish by

²⁶⁵ See *supra* Part II.

²⁶⁶ See *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion) ("Consequently at all stages of the proceedings the Due Process and Equal Protection Clause protect persons like petitioners from invidious discriminations.").

²⁶⁷ See *id.*; *Harper v. Va. Bd. of Educ.*, 383 U.S. 663 (1966).

²⁶⁸ *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).

²⁶⁹ *Id.*

²⁷⁰ *Griffin*, 351 U.S. at 18 (plurality opinion).

²⁷¹ See *M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996); see also *Tate v. Short*, 401 U.S. 395, 397–98 (1971) (striking down a Texas law that required criminal defendants unable to satisfy monetary punishments to face incarceration).

²⁷² *Bearden*, 461 U.S. at 666.

²⁷³ See *M.L.B.*, 519 U.S. at 123–24.

²⁷⁴ *Williams v. Illinois*, 399 U.S. 235, 241 (1970).

erecting a barrier to the ballot box.²⁷⁵ As Justice Sotomayor noted in her dissent in *Raysor v. Desantis*, later consolidated into the *Jones* case, “A case implicating the franchise of almost a million people is exceptionally important . . . to warrant review.”²⁷⁶ She added that “this Court’s inaction continues a trend of condoning disenfranchisement”—an *inaction* that cannot remain.²⁷⁷

D. Applying This New Standard to Florida

If held to heightened scrutiny, Florida’s law—and similar restoration schemes employed in other states—would fail. Throughout the *Jones* litigation, Florida maintained that its purpose in conditioning rights restoration on full payment was to ensure all felons “fully repair the harm that they have wrought on society,” secure the collection of payments, and reduce administrative costs.²⁷⁸ Heightened scrutiny would require the state to demonstrate that alternative measures would not adequately satisfy its interests in punishment and fee collection when refusing to re-enfranchise former felons who have made “sufficient bona fide efforts to pay.”²⁷⁹ To ignore alternative means of fulfilling the state’s interests²⁸⁰ and maintain this conditional payment system would do nothing more than deprive an individual of their fundamental right to the franchise “simply because, through no fault of [their] own, [they] cannot pay.”²⁸¹ As the Court wrote in *Bearden v. Georgia*, “[s]uch a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.”²⁸² Although the state may have a “fundamental interest in appropriately punishing persons . . . who violate its criminal laws,”²⁸³ this will not justify specifically targeting those with a genuine inability to pay whilst providing no alternative routes to achieve rights restoration. In this instance, the state’s interest in ensuring the payment of restitution and fees, rehabilitation of former felons, and punishment would not carry the day.

²⁷⁵ Although this Comment aims to utilize Florida’s system as a prime example of the constitutional problems inherent in pay-to-vote systems, it is important to highlight that several other states employ similar statutes. See LOVE & SCHLUSSEL, *supra* note 67, at 4; see also *supra* Part II (discussing alternative rights restoration schemes throughout the country).

²⁷⁶ *Raysor v. Desantis*, 140 S. Ct. 2600, 2602 (2020) (Sotomayor, J., dissenting).

²⁷⁷ *Id.* at 2603.

²⁷⁸ State Defendant’s Brief on Appeal, *supra* note 32, at 28.

²⁷⁹ *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

²⁸⁰ See *supra* Part II (discussing alternative rights restoration schemes throughout the country).

²⁸¹ *Bearden*, 461 U.S. at 672–73.

²⁸² *Id.* at 673.

²⁸³ *Id.* at 669.

First, payment-based restoration does not satisfy the state's interest in collecting payment. For those genuinely unable to pay, LFO requirements will not suddenly make payment forthcoming.²⁸⁴ Out of the 1.5 million former felons in Florida, seventy-seven percent “have otherwise completed [other] terms of their sentence[.]” but still owe an LFO of some degree.²⁸⁵ Further, it is estimated based on county data that seventy percent of felons who have completed all terms apart from LFOs were represented by state appointed counsel for indigency.²⁸⁶ Knowing that brushes with the justice system tend to only exacerbate poverty, the number of former felons with a genuine inability to pay likely amounts to a similar percentage. Thus, such a requirement does nothing “more than punish[.] a person for his poverty,” as the state knows this money will not be forthcoming.²⁸⁷

Further eroding the significance of the interest in fee collection, the state does not actually receive the full amounts as required by the law.²⁸⁸ Particularly, SB 7066 has not aided in the collection of restitution, nor has it allowed for full payment of the owed amounts through its transfer of LFOs to collection agencies.²⁸⁹ Its method of collection does not even require the felon to satisfy the exact dollar amount.²⁹⁰ Additionally, the manner of collection imposes additional barriers, as many counties institute a \$25 fee just to enroll in a payment plan.²⁹¹ If the judgment is turned over to a collection agency, these organizations “routinely charge fees of up to [forty percent] and remit to the county only the net amount remaining after deducting the fee.”²⁹² Thus, even if an individual is genuinely able to pay their LFOs entirely, the state does not receive the full amount SB 7066 claims it requires.²⁹³

This is not to say there would not be a constitutionally sound manner of enacting a restoration scheme to serve the state's interest in collecting LFOs through less restrictive means. Several other states employ statutes that would pass muster under this new standard of review. For example, Iowa utilizes two separate restoration paths, distinguished only between non-violent felonies and

²⁸⁴ *Id.* 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.”).

²⁸⁵ *Jones v. Governor of Fla.*, 975 F.3d 1016, 1066–67 (11th Cir. 2020) (en banc) (Jordan, J., dissenting).

²⁸⁶ *Id.* at 1067.

²⁸⁷ *Bearden*, 461 U.S. at 671.

²⁸⁸ *Jones*, 975 F.3d at 1069–70 (Jordan, J., dissenting).

²⁸⁹ *Id.*

²⁹⁰ *See id.* at 1070.

²⁹¹ *Id.* at 1069.

²⁹² *Id.*

²⁹³ *Id.*

felonies including homicide and related crimes.²⁹⁴ Those within the non-violent category receive automatic restoration following discharge from confinement or supervision, and those within the “Homicide and Related Crimes” category are required to pay their LFOs.²⁹⁵ However, once enrolled in a payment plan, these individuals are able to register to vote, avoiding indefinite disenfranchisement and providing an alternate route to political participation.²⁹⁶

Similarly, the state of Washington employs three avenues to obtain enfranchisement that are distinct from full payment of LFOs.²⁹⁷ First, if the individual has been convicted of either a federal or out-of-state crime, then voting rights are “restored as long as the individual is not” incarcerated.²⁹⁸ Second, if an individual has completed their term of supervision, the right to vote is provisionally restored and only revoked if the person has willfully failed to “comply with the terms of his or her order to pay” LFOs.²⁹⁹ Third, one may receive restoration “five years after release from [state] custody and completion of all non-financial obligations of the sentence.”³⁰⁰ All of Washington’s options offer an opportunity for the state to collect some payment whilst permitting restoration regardless of one’s ability to pay. Florida—and those states which employ similar laws—should seek to mimic other states’ systems if it wishes to satisfy its interests without invidiously operating a scheme grounded on discriminatory distinctions.

VI. HEIGHTENED SCRUTINY WOULD HAVE IMPLICATIONS FOR BOTH INDIVIDUALS AND AMERICAN DEMOCRACY

In *Reynolds v. Sims*, the Supreme Court noted that “[i]t has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote. . . . To the extent that a citizen’s right to vote is debased, he is that much less a citizen.”³⁰¹ Such a debasement has negative implications for both the individuals who must suffer the punishment and for the preservation of American democracy. Thus, to establish heightened scrutiny as the proper review for laws which enact criminal punishment upon fundamental rights would memorialize this country’s commitment to access to the polls, regardless

²⁹⁴ *Voting Rights Restoration*, *supra* note 86.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ LOVE & SCHLUSSEL, *supra* note 67, at 12–13.

²⁹⁸ WASH. REV. CODE § 29A.08.520(1) (2020).

²⁹⁹ *Id.* at (2)(a).

³⁰⁰ LOVE & SCHLUSSEL, *supra* note 67, at 12–13; *see* WASH. REV. CODE § 9.94A.637(2)(a) (2020).

³⁰¹ *Reynolds v. Sims*, 377 U.S. 533, 554, 567 (1964).

of one's pocketbook. Accordingly, section A discusses how permitting former felons to register despite outstanding LFOs would reduce recidivism rates and encourage rehabilitation and reintegration to society—fulfilling the most important goals of our criminal justice system. Section B examines how heightened scrutiny for wealth-based restoration laws would positively impact American democracy and begin to heal the citizenry divides these barriers have fostered.

A. Eliminating Barriers to the Franchise Would Be Transformative for the Individual

When discussing widespread changes to our criminal justice system, the default view is to examine such an issue from the macro level. However, conditional-payment rights restoration laws are individual in their operation. A formerly incarcerated woman described the impact disenfranchisement had on her life as follows:

It's just like a little salt in the wound. . . . [Y]ou're trying to be a good taxpayer and be a homeowner. . . . Just one little vote, right? But that means a lot to me. . . . It's just loss after loss. . . . [Y]ou telling me that I'm still really bad because I can't [vote] is like making it sting again. It's like haven't I paid enough?³⁰²

For so many, “[d]isenfranchisement can . . . be seen as an extension of the criminal label,” representing a sort of “civil death” and communicating to both the offender and greater society that this individual has been cast out.³⁰³

Rosemary McCoy, a Florida native and one of the plaintiffs in *Jones*,³⁰⁴ described disenfranchisement as “bondage,” positing that “[w]e are living in captivity in 2020, and when we can't vote, [we] are definitely in captivity because [we] don't have a voice.”³⁰⁵ She described it as akin to slavery, stating that by barring restoration the state “put [former felons] back into that same type of mentality.”³⁰⁶ Ms. McCoy's likening has similarly been expressed by Michelle Alexander in *The New Jim Crow*:

³⁰² JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELONY DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 4 (2006).

³⁰³ Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 *BERKELEY LA RAZA L.J.* 407, 415 (2012).

³⁰⁴ See *Jones* Consolidated Brief, *supra* note 10, at 8.

³⁰⁵ Lawrence Mower & Langston Taylor, *Amendment Four Was Supposed to Let Thousands of Felons Vote. Most Won't. What Happened?*, *MIA. HERALD*, <https://www.miamiherald.com/news/politics-government/state-politics/article246273100.html> (Oct. 10, 2020).

³⁰⁶ *Id.*

Once you're labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury service—are suddenly legal. As a criminal, you have scarcely more rights . . . than a black man living in Alabama at the height of Jim Crow.³⁰⁷

These old forms of discrimination cannot continue to exercise such control over our citizenry when founded upon such an arbitrary notion unrelated to the exercise of voting rights.

In perpetrating the civil death and exclusion of so many of its citizens, the state's interest in rehabilitation and deterrence are not being met. In *Jones*, Florida argued that requiring full payment of LFOs would ensure former felons repaid their debt to society, concluding that payment-based rights restoration was necessary for post-conviction rehabilitation.³⁰⁸ However, paying to vote not only does little to rehabilitate those with prior convictions, but also encourages further recidivism. If this barrier to participation were to be eroded when faced with heightened scrutiny, then the tide could begin to turn for so many of these individuals. They would no longer be burdened by these financial obligations nor from the haunting past of their criminal conviction—permitting greater reintegration into society after incarceration.

Payment-based rights restoration does not tend to make society whole again following a criminal infraction, nor does it encourage deterrence. Rather, it contributes to higher rates of recidivism. As noted earlier, these payment-based schemes serve as yet another form of how the state aims to criminalize poverty.³⁰⁹ Thus, they often have the opposite impact than intended, leading many former offenders to feel ostracized from their communities and prompting them to return to criminal activity as a way to satisfy their large LFO amounts.³¹⁰ Additionally, due to the scheme's near invisible nature, it does not tend to deter future crimes.³¹¹ The Supreme Court recognized this in *Bearden* when reviewing

³⁰⁷ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2012).

³⁰⁸ State Defendant's Brief on Appeal, *supra* note 32, at 28 (“[T]he State surely has a legitimate interest in promoting the rule of law by insisting that all felons fully repair the harm they have wrought on society before being allowed to vote.”).

³⁰⁹ See McCormack, *supra* note 42, at 227.

³¹⁰ See Hamilton-Smith & Vogel, *supra* note 303, at 415; see also COMFORT, *supra* note 44, at 182 (noting how many formerly incarcerated individuals utilize the “oddly beneficial aspects of the penitentiary,” such as job placement and mental health services, in the absence of social welfare institutions).

³¹¹ *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and “The Purity of the Ballot Box,”* 102 HARV. L. REV. 1300, 1307 (1989); see also The Daily, *supra* note 70 (including an interview with a former

a Georgia law that revoked probation for failure to pay restitution, noting “such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay” to avoid further punishment.³¹²

These trends toward recidivism have been supported by data across the country. A study in Washington State demonstrated that payment of LFOs intensified the already existent problems with re-entry for those with felony convictions by reducing income, “worsening credit ratings,” deterring efforts to acquire either employment or educational opportunities, “creating incentives to avoid work,” and trapping those within the criminal justice system by making it more difficult to obtain restoration of voting rights or “to seal one’s criminal record.”³¹³ Additionally, several studies across the country all found that LFO debt can lead to greater recidivism either through a turn to illegal methods to obtain finances or through reincarceration for failure to make payments.³¹⁴

Not only would elimination of payment-based restoration aid deterrence, but it would also further reintegrate individuals back into society by permitting participation in the political process irrespective of one’s financial resources. One of the key goals of the American criminal justice system is to promote rehabilitation of offenders—a goal that cannot be achieved whilst systematically preventing those who are too poor to avoid access to the ballot box.³¹⁵ Particularly, many former offenders have affirmed the importance of the right to vote in reintegration. For example, one formerly incarcerated Florida man explained how his return to society had been difficult in terms of securing employment and moving into his own home.³¹⁶ However, he noted his hope for the ability to make change in his community—a hope fostered by the passing of Amendment Four and later curtailed by the passage of SB 7066—offering that “[t]he voting thing is the most important. . . . That’s what creates that voice for people like ex-felons.”³¹⁷ In just the first three months of 2019 following Amendment Four’s passage, voter registration of formerly incarcerated

felon who explains he had not thought about disenfranchisement when he was convicted).

³¹² *Bearden v. Georgia*, 461 U.S. 660, 671 (1983).

³¹³ KATHERINE A. BECKETT, ALEXES M. HARRIS & HEATHER EVANS, *THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE* 4–5 (2008).

³¹⁴ Annie Harper, Callie Ginapp, Tommaso Bardelli, Alyssa Grimshaw, Marissa Justen, Alaa Mohamedali, Isiah Thomas & Lisa Puglisi, *Debt, Incarceration, and Re-Entry: A Scoping Review*, *AM. J. CRIM. JUST.* 250, 267 (2020).

³¹⁵ *Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring) (“Such penal methods seek to achieve . . . that society should make every effort to rehabilitate the offender and restore him as a useful member of society . . .”).

³¹⁶ Mazzei, *supra* note 71.

³¹⁷ *Id.*

individuals increased tenfold.³¹⁸ The testimony from one individual who had registered during that time perfectly encapsulates the transformative potential of a new standard: they submitted, “I felt like part of America again.”³¹⁹

B. Eliminating Barriers to the Franchise Would Be Transformative for American Democracy

Universal suffrage has been an American promise since the Founding. In Federalist No. 57, James Madison declared the following:

Who are to be the electors of federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of people of the United States.³²⁰

Nearly every state constitution has emphasized the promise of the Founding, including statements guaranteeing the franchise to its citizens.³²¹ By the enactment of the Fourteenth Amendment, such a textual legacy was solidified,³²² despite its grant still being out of reach for so many.³²³ Throughout American history and to the present day, the right to vote has become ubiquitous with the grant of American citizenship, as the “central pillar of liberal citizenship” is political participation.³²⁴

The number of individuals being excluded from the democratic process due to disenfranchisement is staggering. Throughout the country, 6.1 million people

³¹⁸ Morris, *supra* note 116, at 2.

³¹⁹ Lawrence Mower & Langston Taylor, *Florida Ruled Felons Must Pay to Vote. Now, It Doesn't Know How Many Can*, TAMPA BAY TIMES (Oct. 7, 2020), <https://www.tampabay.com/news/florida-politics/elections/2020/10/07/florida-ruled-felons-must-pay-to-vote-now-it-doesnt-know-how-many-can>.

³²⁰ THE FEDERALIST NO. 57 (James Madison).

³²¹ KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 46 (2012).

³²² Jeffrey Rosen & Tom Donnelly, *America's Unfinished Second Founding*, ATL. (Oct. 19, 2015), <https://www.theatlantic.com/politics/archive/2015/10/americas-unfinished-second-founding/411079/> (“While the 1878 Framers succeeded in creating the most durable form of government in history, it’s only after [the Fourteenth Amendment] that the Constitution fully protected the liberty and equality promised in the Declaration of Independence.”).

³²³ We have yet to achieve the full promise of the Fourteenth Amendment, as reflected by the discrimination that continues to exist throughout this country and exemplified by the pay-to-vote restoration schemes described in this Comment.

³²⁴ See Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L.J. 53, 69 (2006). The U.S. Citizenship and Immigration Services even includes voting as one of the important reasons to consider U.S. citizenship. See *Should I Consider U.S. Citizenship?*, U.S. CITIZENSHIP AND IMMIGR. SERVS., uscis.gov/citizenship/learn-about-citizenship/should-i-consider-us-citizenship (July 5, 2020).

are estimated to be disenfranchised as a result of a felony conviction; this accounts for one out of every forty adults.³²⁵ States that impose post-confinement disenfranchisement make up over half of the entire disenfranchised population.³²⁶ Florida accounts for roughly half of this national total with “1.5 million individuals disenfranchised post-sentence.”³²⁷ Barring large segments of the population from the ballot box—over two percent of the total voting population nationally and ten percent of the voting population in Florida—is a poison to American democracy.³²⁸ Accordingly, the elimination of payment-based restoration must be accomplished if we are ever to heal the citizenry divide disenfranchisement has created and work toward universal suffrage.

First, pay-to-vote felony disenfranchisement has delineated two classes of citizenry operating within our country: (1) those with means to exercise control, and (2) those without, who are unable to obtain access to the ballot box. Political scientist Katherine Irene Pettus explains felony disenfranchisement in America has “institutionalize[d] a fractionalized national polity” from which two distinct groups emerge—one of the fully franchised citizens who enjoy equal participation within our political process and another comprising those who are disenfranchised and unable to legally participate in American democracy.³²⁹ In this model, the first polity essentially “take[s] turns ruling” over those who are permanently disenfranchised.³³⁰ The ruling class may relish in the positive impacts of their citizenship whilst disenfranchised felons remain indefinitely exempted from asserting any political power.³³¹

To worsen the plight of the disenfranchised, “elected officials [often] feel little pressure” from non-voters, disallowing such a constituency to advance any causes or elect any officials that may gravely affect their respective communities.³³² This does not merely persist at the federal level. For example, those with children are unable to influence their local school boards.³³³ Without

³²⁵ UGGEN ET AL., *supra* note 22, at 3.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.* at 3, 15.

³²⁹ KATHERINE IRENE PETTUS, *FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM AND MODERN CONSEQUENCES* 7–8 (2d ed. 2013).

³³⁰ *Id.* at 8.

³³¹ *Id.*

³³² Ludovic Blain III, *One Person, No Vote: Felony Disenfranchisement Strips People of Color of Political Power*, in 10 *RACE, POVERTY & THE ENVIRONMENT* 49, 50 (2003).

³³³ See Kelli Jo Griffin, *I Was Arrested for Voting*, ACLU (Nov. 7, 2014, 12:00 PM), <https://www.aclu.org/blog/speakeasy/i-was-arrested-voting>. Kelli is the mother of four children and a frequent volunteer at her child’s school and at a women’s crisis center. *Id.* She was convicted of a nonviolent drug charge in 2008 and told that she would regain her voting rights after serving her probation. *Id.* After registering and casting a ballot, she was

the right to vote, former felons genuinely unable to pay LFOs are unable to “exercise the franchise in a free and unimpaired manner” and thus unable to preserve their “other basic civil and political rights.”³³⁴ This nation must end the contradictory notion of holding citizens accountable in the criminal justice system for legal violations whilst denying them influence over those same laws.³³⁵

Payment-based restoration additionally creates a double-citizenship identity in which disenfranchised individuals cannot vote in national elections as a result of being disenfranchised for felonies via their state citizenship. Prior to the Civil War, American citizenship was generally thought of as derivative of the states, permitting each locale to “define citizenship and qualify electors for state and national office on their own terms” as “the status of national citizenship remained at best vague . . . [with] the Constitution mention[ing] it without defining what it was.”³³⁶ From the Fourteenth Amendment emerged a new national citizenship, memorializing that individuals were citizens of both the nation and their respective state.³³⁷ As a result, states have utilized this dual citizenship identity to prescribe various ways to limit the privileges endowed by one’s national citizenship, delineating “free American citizens . . . who, as a result of their state identity, are not ‘qualified voters’ for the purposes of national elections.”³³⁸ So long as payment-based restoration persists, this contradictory premise will continue to damage American democracy, leaving former felons in a wake of confusion and relegation for one reason—a genuine inability to pay.

CONCLUSION

The Supreme Court has held that “[w]hen an eligible citizen misses an opportunity to vote, the opportunity is gone forever; the vote cannot later be

arrested for voter fraud and eventually acquitted. *Id.* However, she remains disenfranchised, pleading, “I am a changed person. I should be able to vote in things regarding my child’s school, regarding my community, regarding things that are happening in my life because that affects me.” *Id.*

³³⁴ *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

³³⁵ Gideon Yaffe, *Give Felons and Prisoners the Right to Vote*, WASH. POST (July 26, 2016), https://www.washingtonpost.com/opinions/let-felons-and-prisoners-vote/2016/07/26/f2da2d64-4947-11e6-acbc-4d4870a079da_story.html.

³³⁶ *PETTUS*, *supra* note 329, at 44 (citation omitted).

³³⁷ *Id.*

³³⁸ *Id.* at 45–46, 48–49 (“Elected majorities in the states . . . used the constitutional means at their disposal to strip former slaves of their citizenship status and restore the ‘right’ conception of justice.”). *See generally* Cammett, *supra* note 73 (examining how state-enacted barriers to enfranchisement have created a class of “shadow-citizens”); Figler, *supra* note 73 (discussing the use of felony disenfranchisement as a method to disenfranchise Black Americans in the Jim Crow Era).

cast.”³³⁹ When an individual is faced with indefinite disenfranchisement employed by a system such as Florida’s, they suffer an irreparable harm every time an election passes them by. For Ms. Raysor and so many others mentioned throughout this Comment, payment-based restoration has prevented reintegration back into society whilst doing little to deter future criminal activity.³⁴⁰ It exacerbates the challenges already present for those with criminal records, preventing them from receiving public benefits and certain education and job opportunities—two pathways necessary to accumulate the financial resources required for rights restoration.³⁴¹ So many are consigned to civil death and a lifetime with a criminal label—despite serving their terms of sentence—due to these looming LFOs. Thus, the Eleventh Circuit’s decision in *Jones* and the Supreme Court’s inaction on unconstitutional restoration frameworks cannot stand.

Accordingly, the Supreme Court should address payment-based restoration schemes that exist throughout the country,³⁴² pioneering a new path forward to target laws that punish on account of poverty. This new standard should be founded upon the fundamental fairness guaranteed by the Fourteenth Amendment, combining the Court’s progeny in both voting rights and the rights of criminal defendants to cement an idea it proscribed long ago—all “ought to obtain right and justice freely, . . . and without being obligated to purchase it.”³⁴³

The court system remains the clearest pathway to overturning these restoration laws grounded in wealth-based discrimination. However, currently, the Eleventh Circuit’s decision to uphold Florida’s SB 7066 remains the law of the land, leaving many without relief as election after election passes them by. Thus, Congress should pass a new kind of Voting Rights Act—one that safeguards this country’s commitment to accessing the polls regardless of one’s pocketbook. Although such legislation may be subjected to legal challenges

³³⁹ *Jones v. DeSantis*, 410 F. Supp. 3d 1284, 1310 (N.D. Fla. 2019).

³⁴⁰ *See supra* Part VI.A.

³⁴¹ *See supra* Part I.

³⁴² *See supra* notes 76–77 and accompanying text (discussing the states that allow LFOs to deprive former felons of voting rights restoration).

³⁴³ *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion).

from various states and may have difficulty passing due to political wills, each legislator has a commitment to enact such a law to provide instantaneous relief for those facing the continuous and irreparable harm that payment-based restoration has levied upon their lives.

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