No. 19-14551

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Kelvin Leon Jones, *et al.*,
Plaintiffs-Appellees,
v.

Ron DeSantis, in his official capacity
as Governor of the State of Florida, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Florida,
No. 4:19-cv-300-RH/MJF

BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE AND R STREET INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following listed persons and entities as described in 11th Cir. R. 26.1-2(a) have an interest in the outcome of this case, and were omitted from the Certificates of Interested Persons in briefs that were previously filed per 11th Cir. R. 26.1-2(b).

1. The Cato Institute
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5. The R Street Institute
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INTERESTS OF AMICI CURIAE

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The R Street Institute is a non-profit, nonpartisan, public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.[1]

STATEMENT OF THE ISSUE

Whether the district court correctly enjoined SB7066's legal financial obligation requirement as applied to those genuinely unable to pay.

[1] No party's counsel authored this brief in whole or in part. No person, other than amicus curiae's counsel, funded the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case presents issues that strike at the very core of the liberties guaranteed by our democratic and constitutional society. Amici believe that SB7066, insofar as it excludes people who cannot afford to pay criminal court debt from participation in the democratic process, perhaps permanently, violates the bedrock guarantee of equal rights that every citizen enjoys. The issues presented in this case must be understood in context. First, the unprecedented and growing imposition of fines, fees, court costs, and other financial obligations by state criminal courts has created an enormous class of citizens in debt to the government. As people charged with crimes are often indigent, this proliferation of financial obligations has created an ever-increasing cohort of society that is are kept in poverty by its continuing inability to pay court debt. Second, the unchecked expansion of criminal laws, including felony criminal laws, has extended well beyond what the framers likely considered "rebellion[] or other crime" when the Fourteenth Amendment was drafted, resulting in the disenfranchisement of people convicted of crimes that have no relevance to voting. Especially in light of these developments, this Court should closely scrutinize any law that purports to condition the ability to vote on payment of court debt.

As a constitutional matter, this case falls squarely within the line of cases beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956), which have held that a state

denies equal protection of the laws when it conditions a right or benefit solely on the ability to pay. Appellants attempt to distinguish *Griffin* and its progeny by claiming that those cases apply only where individuals face incarceration, but that limitation is belied by a multitude of cases in which the Supreme Court has applied the doctrine in relation to other civil rights. Appellants' additional claim that indigent Appellees suffer no constitutional harm because, as felons, they have no "fundamental right" to vote rests on a mischaracterization of both *Griffin* and the nature of the rights to which it applies. Although people with criminal convictions are within a class of people who constitutionally may have their right to vote abridged or denied, once the state chooses to re-enfranchise that class, it may not discriminate on the basis of wealth absent a compelling government interest and narrowly tailored means.

Griffin mandates that this Court apply heightened scrutiny to evaluate SB7066, which it cannot withstand. Amici ask that this court affirm the district court's ruling and uphold the preliminary injunction.

ARGUMENT

I. The Overuse of Fines, Fees, Costs, and Other Financial Obligations in State Criminal Courts Harms Court Debtors and Taxpaying Floridians

This case arises within the context of the unchecked expansion of "user-funded" criminal justice; that is, the funding of criminal justice systems (and often other government functions) through the collection of fees from people who are prosecuted and convicted. On an increasing basis, state and local governments assess fees at virtually every stage of a criminal prosecution.[2] These fees impose a massive burden on the many Americans who are convicted of crimes. In total, people with criminal convictions in the United States owed more than $50 billion in criminal justice debt as of 2011.[3] The growth of fees and court costs in criminal cases stems from a deliberate policy choice to rely increasingly on the criminal-justice system as a source of public revenue. In 1986, the Conference of State Court Administrators noted the proliferation of "[f]ees and miscellaneous charges . . . as [a] method to meet demands for new programs without diminishing general tax

[2] Alicia Bannon et al., Brennan Ctr. for Justice, *Criminal Justice Debt: A Barrier to Reentry* 8 (2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf.

[3] Douglas N. Evans, Research & Evaluation Ctr., John Jay Coll. of Criminal Justice, *The Debt Penalty: Exposing the Financial Barriers to Offender Reintegration* 7 (Aug. 2014), https://jjrec.files.wordpress.com/2014/08/ debtpenalty.pdf.

revenues."[4] Nearly 30 years later, a 2015 issue brief by the Council of Economic Advisors observed that state and local jurisdictions were pressured to transfer the burden of criminal-justice expenditures from taxpayers to defendants.[5] This shift creates a deeply regressive form of taxation because a great number of people arrested and charged with crimes are poor. One study, using nationally representative data, found that about 36 percent of people arrested once in 2017, and 49 percent of people arrested multiple times, had individual incomes below $10,000 per year, well below the poverty level of $12,060.[6] Involvement with the criminal justice system only compounds people's poverty, as arrest and conviction often result in the loss of employment and other collateral consequences that make it more difficult to prosper.[7] As a result, those who are asked to fund the government are those who often are least able to pay.

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[4] Conference of State Court Adm'rs, *Standards Relating to Court Costs: Fees, Miscellaneous Charges and Surcharges and a National Survey of Practices* 4–5 (June 1986), *available at* https://ncsc.contentdm.oclc.org/digital/collection/financial/id/81/.

[5] Council of Econ. Advisers, *Economic Perspectives on Incarceration and the Criminal Justice System* (2016), *available at* https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf.

[6] Alexi Jones et al., Prison Policy Initiative, *Arrest, Release, Repeat: How Police and Jails Are Misused to Respond to Social Problems* (Aug. 2019), https://www.prisonpolicy.org/reports/repeatarrests.html.

[7] *See, e.g.*, U.S. Comm'n on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* 36–37 (2019)

These developments have had a significant impact in Florida. In 2018 alone, across all courts and jurisdictions in Florida, over $1.1 billion in fines, fees, and costs were assessed.[8] The total amount collected that year was over $863 million. *Id.* at 5. Felony criminal cases alone accounted for over $255 million of the assessed amount,[9] of which over $235 million was "mandatory," *id.* at 10, that is, imposed without any consideration of the individual's circumstances, including the person's actual ability to make payments on the charged amount. This includes a number of revenue-generating fees and costs, including a "prosecution fee" of at least $100 in each case, used to fund State's Attorney's offices. *See* Fla. Stat. Ann. § 938.27.[10]

(describing challenges people convicted of crimes face obtaining gainful employment).

[8] Fla. Clerks & Comptrollers, *2018 Annual Assessments and Collections Report* 4, *available at* https://finesandfeesjusticecenter.org/content/uploads/2019/01/2018-Annual-Assessments-and-Collections-Report.pdf.

[9] The remainder is made up of collections from traffic violations, misdemeanor offenses, juvenile court, probate court, and county and circuit civil courts. Felony criminal collections represent the second largest share of assessed debts after traffic violations. *Id.*

[10] Amici recognize that restitution serves a different purpose from other forms of court-imposed debt, as it is traditionally paid to a crime victim or a body representing victims and is closely tied to the loss experienced by the victim. In contrast, other types of fines and fees are paid to state and local governments, serve as a tax on the payer, and are not closely tied to an individual's crime. Although the impact on the individual owing court debt is unlikely to differ based on the type of debt owed, amici understand that the impact of the payment of restitution on the victims of crime is different.

According to the 2018 data, approximately half of the imposed financial obligations in Florida were converted into civil judgments or liens.[11] Only about $6 million of the imposed obligations were reduced, suspended, or waived, accounting for less than 3 percent of the total amount. *Id.* Less than $53 million of the assessed felony criminal-case fees were actually collected, indicating a collection rate of 20.55 percent. *Id.* at 11. According to the Florida Clerks and Comptrollers' data, over $200 million, i.e., 78.4 percent of the total assessment, was imposed on people who were indigent, incarcerated, or both, and who, by the report's standards, are considered to have a "minimal collection expectation." *Id.* at 6, 11. By Florida's own judgment, over three-fourths of the financial obligations assessed in felony criminal cases in 2018 were imposed on people who the state did not believe would be able to pay. These amounts do not include additional costs, such as supervision fees paid by people on probation.

Because so few of the assessments are collected, the system frequently functions to the detriment of both court debtors and Floridian taxpayers. The case of Erin Thompson, a single mother of three, is emblematic of the self-defeating operation of this system. Ms. Thompson pleaded guilty to felony child neglect for leaving two young children home alone and was placed on two years of probation. *Thompson v. State*, 250 So. 3d 132, 133 (Fla. Dist. Ct. App. 2018). She was required

[11] Fla. Clerks & Comptrollers, *supra* n.8, at 10.

to pay $917 in court costs and fines, and amassed $960 in supervision fees during the course of her probation from accumulated monthly payments and drug testing costs. *Id.* Ms. Thompson was also indigent: Her only income during the probation period came from food stamps, governmental housing assistance, and periodic work cleaning a football stadium for which she earned $7.50/hour. *Id.* at 139 (Makar, J., dissenting). Because of her poverty, she made no payments on the nearly $2000 that she owed. *Id.* She testified at her probation revocation hearing that she was unable to pay but had otherwise complied with the terms of her probation, including completion of a case plan, mental-health evaluations, and random drug tests. *Id.* at 138–39 (Makar, J., dissenting). Rather than waive or reduce the fees, the trial court revoked her probation and sent her to prison, all without conducting any inquiry into her ability to pay or permitting her public defender to make an argument. *Id.* at 138. The appeals court affirmed the decision. *Id.* As the dissenting judge noted, this decision—purportedly justified by Ms. Thompson's failure to make payments intended to cover the cost of government services—had the ironic effect of imposing a significant burden on taxpayers, as the cost of her resulting incarceration was far greater than the amount the state hoped to collect from her. *Id.* at 142 n.5 (Makar, J., dissenting).

User-funded justice has an enormous detrimental impact on individuals in the system, their families, and their communities, who collectively make up a large

swath of the citizenry in Florida and elsewhere. A 2014 study across 14 states concluded that the average amount of money spent per case on conviction-related costs, including restitution and attorney fees, was $13,607.[12] These burdens frequently fall primarily on family members, who themselves often lack the ability to pay. *Id.* The weight of court-owed financial obligations can force entire families into destitution or make them reliant on predatory loans. *Id.* at 13–14. Families also reported that they "struggled to cover basic expenses like rent and food, but endured these sacrifices because failure to pay fees and fines can send incarcerated individuals back to prison or jail." *Id.* at 14.

The financial burden of criminal convictions has a wide-ranging destructive effect but receives little constitutional scrutiny from the courts. Although the text of the Eighth Amendment prohibits excessive fines, this prohibition is so rarely invoked that the Supreme Court observed in 1998 that it had "never actually applied" the clause. *United States v. Bajakajian*, 524 U.S. 321, 327 (1998). The Court did not extend the clause's applicability to the states until 2019. *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019). More importantly, many of the financial obligations imposed as part of a criminal prosecution may fall outside the Eighth Amendment's scope, as it does not apply to payments intended to be remedial or compensatory rather than

[12] Saneta deVuono-powell et al., *Who Pays? The True Cost of Incarceration on Families* 13 (2015), https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf.

punitive. *Austin v. United States*, 509 U.S. 602, 610 (1993). It is unclear whether costs and fees intended to offset the government's expense in prosecuting and supervising a person are sufficiently punitive to merit Eighth Amendment review. As Ms. Thompson's case illustrates, these costs often make up the greater part of the debt owed by a person who has been prosecuted. *See Thompson*, 250 So. 3d at 133 (noting that supervision costs alone made up over half of the amount owed).

Moreover, this Court has determined that for asset forfeitures, ability to pay does not factor into the proportionality test that determines whether a fine is excessive for purposes of the Eighth Amendment. *United States v. Dicter*, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) ("[W]e do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment."); *see also United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 (11th Cir. 1999) (holding that "excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender").

Although the legality of user-funded justice is not at issue in this appeal, the concerns raised by this case demonstrate powerfully the Supreme Court's admonition that "[e]xorbitant tolls undermine other constitutional liberties." *Timbs*, 139 S. Ct. at 689. Absent the district court's injunction, SB7066 will have the effect of excluding a great number of people from voting because of their poverty, while

allowing similarly situated wealthy persons to vote. This stark iniquity will further compound the detrimental effects of Florida's user-funded justice system. It therefore falls to this Court to subject the law to heightened scrutiny insofar as it applies to individuals who, because of their poverty, are unable to pay.

II. The Practice of Felon Disenfranchisement Harms Our Democracy

Although the Supreme Court authorized denial of the right to vote for convicted persons in *Richardson v. Ramirez*, 418 U.S. 24 (1974), its reasoning is subject to criticism, and, ultimately, its outcome undermines the vision of liberty and democracy that form the basis of our modern Republic.

The Court's *Richardson* decision rested on Section 2 of the Fourteenth Amendment, which addresses apportionment of Representatives in Congress. The majority relied on language in Section 2 requiring a loss of representation for abridgment of the right to vote, *except* for abridgment based on "participation in rebellion, or other crime." U.S. Const. Amend. XIV § 2; *Richardson*, 418 U.S. at 52–54. The Court thus referred to Section 2 as an "affirmative sanction" of the exclusion of felons from the vote. *Richardson*, 418 U.S. at 54. The majority in *Richardson* further cited the fact that disenfranchisement for participation in a crime was common at the time of the enactment of the Fourteenth Amendment, and thus justified its interpretation of Section 2. *Id.* at 48.

As pointed out by the dissent, however, another type of disenfranchisement common at the time (one-year residency requirements) had been declared unconstitutional by the Court before *Richardson* was decided. *Id.* at 76 (Marshall, J., dissenting (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972)). Moreover, there is scant evidence that the framers of the Fourteenth Amendment intended the exception in Section 2 to govern future interpretation of Section 1, which requires equal protection of the laws, as even the majority in *Richardson* recognized. *See id.* at 43 ("The legislative history bearing on the meaning of the relevant language of § 2 is scant indeed . . . ."). And Justice O'Connor, writing for the Ninth Circuit, later acknowledged that it is "not obvious how the scope of th[e] Section 2 language affects a Section 1 equal protection claim." *Harvey v. Brewer*, 605 F.3d 1067, 1072 (9th Cir. 2010). In drafting Section 2, "the framers of the Amendment were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence." *Richardson*, 418 U.S. at 43. Or, as the dissent more pointedly argued, the purpose of Section 2, evident from its text and context, was to "provide[] a special remedy—reduced representation—to cure a particular form of electoral abuse—the disenfranchisement of Negroes." *Id.* at 74 (Marshall, J., dissenting).

There are sound public-policy reasons supporting participation in the vote by individuals who have been convicted of felony offenses. The enactment of felony

criminal statutes is a political decision that is determined by the democratic process. Amici believe there is no principled reason that people who are subject to prosecution for certain activities, particularly those that are *malum prohibitum*, should not have an equal say as to whether those activities should be punishable as felonies.

Consider laws prohibiting the personal consumption of substances. A state may choose to make personal possession of 20 grams of marijuana a felony, as Florida does, *see* Fla. Stat. Ann. § 893.13, while possession of much greater quantities of alcohol and tobacco remains lawful. It may, in the future, choose to do the opposite. What substances should or should not be lawful to possess and consume, within appropriate constitutional limits, is a question for the people of Florida to decide. But by excluding those who have been convicted of personal possession of marijuana from the polity, disenfranchisement of felons serves to maintain the status quo. Thus, if public opinion were to shift to the point where the majority of Floridians favored decriminalization of marijuana, that shift might not be reflected at the polls, as many in favor of that policy would be prevented from participating in the electoral process by virtue of that very preference. As a result, the now-disfavored laws would remain, even while disserving and failing to reflect the will of the majority of citizens. As Justice Marshall put it, "[t]he ballot is the democratic system's coin of the realm. To condition its exercise on support of the

established order is to debase that currency beyond recognition." *Richardson*, 418 U.S. at 83 (Marshall, J., dissenting).

The potential suppression of majority will strikes at the core of our democracy, as the courts recognize few constitutional limits on what a state may determine to be criminal conduct. To convict an individual person of a crime, the government must prove each element of the offense beyond a reasonable doubt, *see Dausch v. State*, 141 So. 3d 513, 517 (Fla. 2014); but to enact a law that results in the conviction of millions, the government generally must have only a rational basis, *see, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also* Henry Hart, *The Aims of Criminal Law*, 23 Law & Contemp. Probs. 401, 431 (1958) ("What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?"); *cf.* Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 Yale L.J. Forum 848, 867–68 (2019) (contrasting criminal prohibitions that lead to a total loss of liberty, which must only satisfy rational-basis scrutiny, with laws that terminate parental rights, which must meet heightened scrutiny).

Thus, through criminal disenfranchisement, an unscrupulous temporary majority could shape the electorate by passing criminal laws that disproportionately affect its opponents. This would allow for an end-run around the general constitutional principle that, "[if] they are . . . residents, . . . they, as all other qualified

residents, have a right to an equal opportunity for political representation. . . . 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (striking down Texas law allowing member of the armed services to vote only in county where he resided when he entered service).

Nothing should prevent a state from drafting a narrowly tailored law prohibiting people convicted of certain offenses from voting—for example, those who have been convicted for election fraud or treason, or, as in Florida, those convicted for murder and other serious crimes of violence. But many criminal offenses neither bear a relationship to qualification to participate in the democratic process nor demonstrate an utter disregard for the health and safety of other persons. There has been a massive expansion of criminal laws, both state and federal, in a process some commentators call the "overcriminalization" of America.[13] It is unlikely that the framers, when referring to "rebellion[] or other crime" in Section 2, could have foreseen this expansion and its consequences for the voting public.

[13] *See, e.g.*, John Baker, Federalist Soc'y for Law & Pub. Policy Studies, *Measuring the Explosive Growth of Federal Crime Legislation* (Oct. 2004), https://fedsoc.org/commentary/publications/measuring-the-explosive-growth-of-federal-crime-legislation; Mike Chase, *How to Become a Federal Criminal: An Illustrated Handbook for the Aspiring Offender* (2019); Cato Inst., *Go Directly to Jail: The Criminalization of Almost Everything* (Gene Healy ed. 2004); Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (2011).

The laundry list of crimes that Florida has enacted as felonies illustrates the breadth of this expansion. As examples, in addition to possession of over 20 grams of marijuana, it is a felony in Florida to possess a marine turtle, Fla. Stat. Ann. § 379.2431(1)(e)(6); train a greyhound using live animal bait, Fla. Stat. Ann. § 828.122; or conduct a lottery drawing for the distribution of a prize, Fla. Stat. Ann. § 849.09(1)(c). Some reasonably may believe these activities should be felony offenses; others reasonably may believe they should not. But even if one might denounce the conduct underlying these crimes, that conduct bears no relation to one's qualification to be represented in the government and thus have a say regarding whether such prohibitions and punishments should persist.

Amici laud Florida voters for amending the state constitution to end the practice of felon disenfranchisement for those who have completed their sentences; but, as discussed in Section I, *supra*, the epidemic of user-funded justice means that SB7066 effectively maintains the practice for a great many potential voters. Although this Court has no power to overrule *Richardson*, it bears consideration that, when there is an opportunity to review the impact of laws that deny a great number of citizens their right to vote because of their criminal record and poverty, those laws should receive close attention and scrutiny.

III. SB7066 Denies the Right to Vote Because of Poverty and Therefore Requires Heightened Scrutiny under *Griffin v. Illinois* and its Progeny

This Court need not rely on the epidemics of criminal financial obligations and overcriminalization to justify the application of heightened scrutiny, because it is mandated by longstanding constitutional law. Although equal-protection claims grounded in wealth-based discrimination typically receive only rational-basis review, this case falls under a separate line of cases that requires heightened scrutiny when, "because of their impecunity[, the indigent] were completely unable to pay for some desired benefit, and as a consequence, they sustained *an absolute deprivation* of a meaningful opportunity to enjoy that benefit." *Walker v. City of Calhoun*, 901 F.3d 1245, 1261 (11th Cir. 2018) (emphasis and alteration in original) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973)).

Walker addressed the denial of pretrial liberty during a criminal prosecution and drew on other cases in which the Supreme Court has recognized the applicability of heightened scrutiny. *See Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983) (indigent probationer could not be imprisoned for nonpayment of a financial obligation unless there were no other measures that would adequately meet the State's interests in punishment and deterrence); *Tate v. Short*, 401 U.S. 395, 398 (1971) ("[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." (internal quotation marks

omitted)); *Williams v. Illinois*, 399 U.S. 235, 244 (1970) ("[T]he Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."); *Griffin v. Illinois*, 351 U.S. 12, 18–19 (1956) (states cannot condition the right to appeal on the ability to pay for a transcript).

Appellants attempt to distinguish this line of cases by attributing the application of heightened scrutiny to "the unique effect of incarceration on the fundamental right to physical liberty." Appellants' Br. at 25. This distinction is mistaken, and it has been rejected by the Supreme Court. *M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996) ("*Griffin*'s principle has not been confined to cases in which imprisonment is at stake."). *Griffin* and its progeny have been applied in non-criminal cases and in situations that involved the deprivation of a benefit other than liberty. *See, e.g.*, *id.* at 102 (unconstitutional to deny appeal of termination of parental rights to petitioner who could not pay fee to prepare record); *Zablocki v. Redhail*, 434 U.S. 375, 388 (1978) (striking down law denying marriage certificates to people who were behind on child support payments); *id.* at 394 (Stewart, J., concurring) (explaining that principle of *Boddie*, *Tate*, and *Williams* applied equally in *Zablocki*); *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971) (following *Griffin* and holding unconstitutional denial of divorce proceedings to individuals unable to pay court fees).

Although the *Griffin* line of cases does not apply to any and all benefits, *see United States v. Kras*, 409 U.S. 434, 444–45 (1973) (upholding denial of bankruptcy to indigent petitioner who could not pay filing fee), the Supreme Court has recognized the right to vote as a right to which *Griffin*'s analysis applies, *see M.L.B.*, 519 U.S. at 124 (recognizing as an exception to the general rule of rational-basis review for wealth-based discrimination, "[t]he basic right to participate in political processes as voters and candidates" (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966))). *M.L.B.* squarely situates voting as a benefit that falls within the *Griffin* rule.

Here, there is little doubt that the Appellees who are unable to pay their criminal-court debts will experience "an absolute deprivation of a meaningful opportunity to enjoy" the benefit of voting. *Walker*, 901 F.3d at 1261 (emphasis removed) (quoting *Rodriguez*, 411 U.S. at 20). Unlike the affected individuals in *Walker*, who experienced what this Court concluded was only a "diminishment" of their liberty interest because they were automatically released within 48 hours if they were determined to be indigent,[14] 901 F.3d at 1261–62, Appellees who are unable to

[14] Although recognizing that *Walker* is binding authority in this Circuit, amici disagree with the *Walker* majority's determination that a 48-hour loss of liberty constitutes a "mere diminishment" of a person's right to be free. *See* 901 F.3d at 1274 (Martin, J., concurring in part and dissenting in part) ("In my view, an incarcerated person suffers a complete deprivation of liberty within the meaning of *Rodriguez*, whether their jail time lasts two days or two years."); *id.* at 1277 n.6

pay their court debt in full would be offered no meaningful process to obtain the sought-after benefit absent the district court's injunction. Alternative methods offered by the state to obviate the need to pay are wholly discretionary. Fla. Stat. App. § 98.0751(2)(a)(5)(d), (e). And, as the data discussed in Section I indicates, they are rarely applied. *See supra* at 7 (less than 3 percent of felony criminal assessments reduced or waived). For the poor, disenfranchisement is indefinite, and potentially permanent. This far surpasses a 48-hour restriction. The district court's injunction, requiring a hearing or some other process at which Appellees could demonstrate their indigency and thereby obtain the desired benefit, is markedly similar to the process upheld by this Court in *Walker*.

IV. Appellants Are Mistaken that People With Felony Convictions Have No Fundamental Right to Vote

Appellants' primary effort to avoid this directly applicable line of case law is their contention that (1) the *Griffin* line applies only to denial of a fundamental right, and (2) because people who have been convicted of felony offenses may be denied the ability to vote altogether, they have no fundamental right to vote. *See* Appellants' Br. at 22. But this contention is mistaken for a number of reasons. First, *Rodriguez* characterized the *Griffin* principle as pertaining to "some desired benefit," rather than a fundamental right. 411 U.S. at 20. As discussed above, although

(clarifying that even under the majority's decision, a deprivation of longer than 48 hours would require heightened scrutiny).

M.L.B. clarified that *Griffin* does not apply to the deprivation of every benefit, it certainly applies to the right to vote. This comports with how the Equal Protection Clause of the Fourteenth Amendment has long been understood to apply to elections. *See, e.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) ("[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.").

Second, Appellants' argument is belied by the text of Section 2—the basis for Supreme Court's decision in *Richardson* and the sole constitutional support for the states' ability to restrict voting based on criminal record. The text explicitly recognizes that denial of the right to vote to those who participate in rebellion or other crimes is an abridgment of a right: "when *the right to vote at any election . . . is denied . . . , or in any way abridged,* except *for participation in rebellion, or other crime . . . .*" U.S. Const. Amend. XIV § 2 (emphasis added). Although the abridgment in such instances is permissible, it remains an abridgment of a right, which cannot be reconciled with the notion that these persons have no right at all.

Finally, Appellants' position misapprehends the nature of fundamental rights. The right to bodily liberty is undeniably fundamental, but, like the right to vote, may be denied or abridged when an individual has committed a criminal offense. That

does not mean that the right is rendered a nullity, only that it may be overcome. This Court's analysis in *Walker* is instructive. The class there consisted of individuals who had been arrested for municipal offenses, whose pretrial liberty could be—and was—taken away as a result of their alleged commission of a crime. When deciding whether to apply rational-basis or heightened scrutiny to the 48 hours of detention suffered by indigent arrestees, this Court looked to whether the denial of liberty was a mere diminishment or absolute deprivation of the right, ultimately concluding that it was a diminishment because of its brevity. 901 F.3d at 1261–62. But under Appellants' theory, no such analysis should have been necessary; the mere fact that liberty could be taken away should have been sufficient to eliminate the right altogether. This does not square with how the Constitution has long been applied.

Instead, under *Griffin* and its progeny, when a state decides to grant a benefit related to a fundamental right, it cannot condition that right on the ability to pay a sum of money without satisfying heightened scrutiny. This was precisely the situation in *Griffin*, where the challenged financial burden pertained to the appeal of a criminal conviction. As the Court observed, "[i]t is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." 351 U.S. at 18 (citation omitted). So too here. While Florida has no

constitutional obligation to grant the ability to vote to convicted felons, once Florida chooses to do so, it cannot exclude those who cannot afford to pay unless the exclusion is narrowly tailored to a compelling government purpose.

Neither *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010), nor *Howard v. Gilmore*, 99-2285, 2000 U.S. App. LEXIS 2680 (4th Cir. Feb. 23, 2000) (per curiam) provide meaningful support for Appellants' position. In *Harvey*, felons who had been disenfranchised challenged a law providing for restoration of the franchise, claiming that the requirement conditioning restoration of the right to vote on repayment of fines and restitution violated the Equal Protection Clause. Although the Ninth Circuit determined that this did not constitute the denial of a fundamental right, but rather "denial of the statutory benefit of re-enfranchisement," 605 F.3d at 1079, the court stated at the outset that because no plaintiff alleged indigency, it "explicitly d[id] not address challenges based on an individual's indigent status," *id.* In fact, because indigency was not at issue, the court did not address the *Griffin* line of cases at all. *Harvey* therefore provides little guidance for how denial of the vote based on inability to pay should be considered under *Griffin* and *M.L.B.*

The Fourth Circuit's unpublished opinion in *Howard* provides even less support for Appellants. In that case, a man convicted of a felony brought a *pro se* challenge to Virginia's felon disenfranchisement laws, raising a number of claims, including an equal protection claim and an argument that the $10 fee required for

"restoration of . . . civil rights" constituted an unconstitutional poll tax under the Twenty-Fourth Amendment. *Id.* at *4–5. It does not appear the plaintiff there claimed he was unable to pay, only that the payment itself was unconstitutional. The court dismissed his equal-protection claim, which was rooted in an allegation of racial discrimination, and dismissed the poll tax claim by drawing a distinction between the plaintiff's "right to vote" and "restoration of civil rights" which would have the incidental effect of restoring his ability to vote. *Id.* Although this distinction is arguably spurious, the court's language actually supports Appellees' position in this case. Notably, the court did not indicate at any point that the plaintiff lacked a claim because he had no right to vote. Instead, the court implied that, if it had been the plaintiff's right to vote that had been conditioned on payment of a fee, he likely would have stated a cognizable claim under the Twenty-Fourth Amendment, which as the court described "prohibits conditioning the right to vote upon payment of a fee." *Id.* at *4 (citing *Harper*, 383 at 668–69). *Howard*, in any event, did not address indigency, because there was no indication that the plaintiff in that case could not afford the $10 fee.

The Sixth Circuit's decision in *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010), more closely aligns with Appellants' position, but its rationale for distinguishing the *Griffin* line is poorly reasoned. Assuming the propriety of rational-basis scrutiny, the court dismissed reliance on *Griffin*, *Bearden*, and

Zablocki for the very reason that they applied heightened scrutiny, believing that they did so because of the "importance of the right of access to the courts" and the special nature of incarceration. *Id.* at 749. The Court did not acknowledge that the line has been applied in several cases unrelated to incarceration, or that *M.L.B.* explicitly included voting among the benefits to which those cases apply. In fact, *Johnson* does not reference *M.L.B.* at all. Because of these deficiencies, this Court should decline to follow *Johnson*.

The dangers of the approach advocated by Appellants are evident when one considers other bases on which the government may constitutionally exclude a person from voting. The Supreme Court has permitted denial of the vote for, among other things: illiteracy, *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 52–53 (1959); [15] youth, *see, e.g.*, *id.* at 51 (listing age among grounds for consideration of voter qualifications); and residing in a state for less than 50 days, *Marston v. Lewis*, 410 U.S. 679, 681 (1973). By Appellants' reasoning, people who cannot read, are young, or have recently moved to a new state have no right to vote whatsoever, and therefore states may selectively choose to enfranchise some of these individuals based on their wealth (so long as there is a rational basis to do so). That

[15] Although *Lassiter* was superseded by Section 4(e) of the Voting Rights Act of 1965, 52 U.S.C. § 10303, it has never been overturned. *See Katzenbach v. Morgan*, 384 U.S. 641, 649-50 (1966) (declining to overrule *Lassiter* while upholding constitutionality of Section 4(e) of the Voting Rights Act).

reasoning is wrong. If a state decides to allow people who cannot read or 17-year-olds to vote, it cannot limit this benefit to only the wealthy illiterate or youth from a household without debts. Such an outcome would be repugnant to the values of fairness and equality that underlie our democracy. Under *Richardson*, a state need not satisfy heightened scrutiny to deny people the right to vote *because* of their criminal records. But if a state, like Florida, chooses to differentiate among otherwise-eligible voters based on their ability to pay (regardless of whatever other grounds, like convictions or illiteracy, may justify exclusion), that differential treatment represents the wealth-based denial of a right and must meet the heightened standard of review set forth in the *Griffin/M.L.B.* line of cases.

SB7066's exclusion of people from voting who have served their sentences but are unable to pay court debt cannot survive heightened scrutiny. Although the state has an interest in ensuring that individuals pay their court debts, this interest is not furthered by using denial of the vote as a punishment for those who are unable (and not merely unwilling) to pay. Many of the crimes for which people owe court debts are wholly unrelated to participation in the democratic process through voting. And as the district court explained, there are alternatives that could protect the state's interest in ensuring that court debts are paid by those who can afford them. By contrast, SB7066's general rule on payment of court debts, as it applies to those who cannot pay, is not narrowly tailored to serve a compelling government interest.

CONCLUSION

For the reasons set forth above, amici urge that the district court's order be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit on January 17, 2020, by using the appellate CM/ECF system, and service was accomplished on all counsel of record by the appellate CM/ECF system.

/s/ Mary B. McCord
Mary B. McCord

CERTIFICATE OF COMPLIANCE

1. This brief complies with: (1) the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5), 32(a)(7)(B)(i), and 11 Cir. R. 32-4 because it contains 6,469 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and 11 Cir. R. 32-3 because it has been prepared in a proportionally spaced typeface using Microsoft Word (14-point Times New Roman) and is double-spaced.

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