A Modern Poll Tax: Using the Twenty-Fourth Amendment to Challenge Legal Financial Obligations as a Condition to Re-enfranchisement

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The Twenty-Fourth Amendment to the United States Constitution has received little attention from federal courts since its ratification. The Amendment's language is broad and far-ranging, prohibiting conditioning the right to vote on payment of poll taxes or "any other" tax. Although the Amendment's text, its legislative history, and early Supreme Court decisions strongly indicate that the law's drafters intended to eliminate any and all wealth-based qualifications on voting, many states continue to require people convicted of felonies to pay money to the government before regaining their right to vote. Some litigators have used the Amendment to combat felon re-enfranchisement schemes that unconstitutionally condition access to the ballot box on payment of legal financial obligations (LFOs) associated with the person's criminal sentence. Most recently, the Eleventh Circuit addressed Florida voters' challenge to the Florida Senate's interpretation of Amendment 4, which automatically re-enfranchised people convicted of felonies when they completed "all terms of [their] sentence," including LFOs. This Note explores the lower court's and Eleventh Circuit's analyses of the Twenty-Fourth Amendment, as well as challenges and solutions to using the Amendment in the future to combat unconstitutional re-enfranchisement schemes conditioning the right to vote on a money payment to the government.

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Part I discusses the history of felon disenfranchisement and the Twenty-Fourth Amendment, as well as major Supreme Court decisions applying the Amendment to voting laws. Part II analyzes the line of Federal District Court and Eleventh Circuit decisions addressing Florida's Amendment 4 and whether requiring people convicted of felonies to pay all LFOs before regaining the right to vote violates the Twenty-Fourth Amendment. Part III explores why the Eleventh Circuit's ruling is not in line with the Amendment's text and history, nor with the Supreme Court's Twenty-Fourth Amendment or tax jurisprudence.

INTRODUCTION

Electoral participation is a bedrock principle in American democracy, dating back to this nation's founding. The Declaration of Independence cites the "right of Representation in the Legislature" as "inestimable" to the people and "formidable to tyrants only."[1] Four constitutional amendments explicitly deal with expanding and protecting voting rights,[2] and the Supreme Court declared the right to vote "fundamental."[3] One of the most recent constitutional amendments dealing directly with voting rights is the Twenty-Fourth Amendment. Ratified in 1964, the Amendment states that the right to vote[4] "shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."[5]

Despite such powerful protections for the fundamental right to vote, state governments routinely strip millions of people of their ability to participate in elections through felon disenfranchisement. Felon disenfranchisement has long been part of American law,[6] dating back to the American colonial era.[7] Due to their ubiquity, felon disenfranchisement laws and subsequent re-enfranchisement schemes have had sweeping impacts on huge swaths of American society.[8] States justify denying people convicted of felonies access to

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1. THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).

2. U.S. CONST. amends. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude."); XIX ("The right of citizens of the United States shall not be denied or abridged by the United States or any State on account of sex."); XXIV ("The right of citizens of the United States to vote in any primary or other election for President or Vice President for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."); and XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

3. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (holding "the political franchise of voting" is "a fundamental political right, because [it is] preservative of all rights").

4. The Amendment originally applied only to federal elections. However, the Supreme Court's decisions in *Harman v. Forssenius*, 380 U.S. 528 (1965), and *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), indicate that the Amendment also applies to state and local elections.

5. U.S. CONST. amend. XXIV, § 1. The full text of Section 1 of the Amendment states:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

6. *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (holding that states may disenfranchise people convicted of certain crimes).

7. Bridgett A. King and Laura Erickson, *Disenfranchising the Enfranchised: Exploring the Relationship Between Felony Disenfranchisement and African American Voter Turnout*, 47 J. BLACK STUD. 799 (Nov. 2016).

8. While there are numerous legal arguments that litigators can use to challenge felon disenfranchisement and re-enfranchisement schemes, such as the Fourteenth Amendment's Equal Protection Clause, the Unconstitutional Conditions Doctrine, and the Voting Rights Act, this Note's

the franchise by stating that people who commit serious crimes lose certain privileges of citizenship.[9]

Additionally, the Constitution does not oblige states to re-enfranchise people convicted of felonies at any time. If states choose to do so, they may attach conditions to re-enfranchisement.[10] Nearly all states that provide a path to re-enfranchisement require people to pay the legal financial obligations (LFOs) accompanying their sentences before they become eligible to vote.[11] Five states require people convicted of felonies to pay all LFOs before regaining the right to vote, while three others require payment of some LFOs.[12] In two states, people convicted of felonies can restore their voting rights only by seeking a pardon, which requires payment of LFOs. Twenty other states implicitly compel payment of LFOs prior to voting rights restoration through requiring completion of parole and probation.[13]

LFOs generally encompass the financial aspects of a person's criminal sentence, including fines, restitution, fees, and court costs.[14] However, not all LFOs are alike. Fines and restitution are distinguishable from fees and court costs primarily because fees and court costs raise revenue for the government to cover the cost of running the state's criminal legal system.[15] Conversely, fines are penalties associated with specific offenses or levels of offenses and restitution aims to compensate victims.[16]

On its face, requiring people to pay money to the government in the form of fees before gaining access to the ballot box appears to be a violation of the Twenty-Fourth Amendment's prohibition on poll taxes.[17] However, some courts

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focus will be how litigators can use the Twenty-Fourth Amendment to challenge such laws, as there has been very little litigation on this issue.

9. Jones v. Governor of Florida (*Jones II*), 975 F.3d 1016, 1025 (11th Cir. 2020).

10. *See, e.g.*, Jean Chung, *Felony Disenfranchisement: A Primer*, SENT'G PROJECT (June 27, 2019), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/ [https://perma.cc/PQ5N-S48P?type=image] (seventeen states require people convicted of felonies to complete their prison sentence, parole, and probation before becoming eligible to re-register to vote).

11. Malia Brink, *Fines, Fees, and the Right to Vote*, 45 A.B.A. HUM. RTS. J. 12 (Feb. 9, 2020) (thirty states require payment of LFOs in some capacity prior to regaining the right to vote).

12. *Id.*

13. *Id.*

14. While some parties have argued that restitution and criminal fines violate the Twenty-Fourth Amendment's prohibition on poll taxes (*see, e.g.*, Johnson v. Bredesen, 624 F.3d 742, 750–51 (6th Cir. 2010) (restitution and child support payments); Harvey v. Brewer, 605 F.3d 1067, 1071 (9th Cir. 2010) (fines and restitution)), this Note will focus on fees and court costs, referred to collectively as "fees."

15. *Can't Pay, Can't Vote: A National Survey on the Modern Poll Tax*, CAMPAIGN LEGAL CTR. (July 25, 2019), https://campaignlegal.org/sites/default/files/2019-07/CLC_CPCV_Report_Final_0.pdf [https://perma.cc/8BYL-ECL2].

16. *Id.*

17. Much of this Note's analysis is premised on the notion that courts can enjoin felon re-enfranchisement schemes if they unconstitutionally condition the right to vote on payment of a tax. While courts generally cannot enjoin states' collection of taxes under the Tax Injunction Act, courts have found exceptions in some cases. Litigators arguing that felon re-enfranchisement schemes violate the Twenty-Fourth Amendment should reference the Supreme Court's analysis in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 543–54 (2012) (finding jurisdiction to hear a challenge to the Affordable

have not viewed state re-enfranchisement schemes as such, primarily because those conditions only apply to people convicted of crimes.[18] Additionally, some courts have distinguished LFOs and taxes by describing all LFOs as "penalties," despite the fact that some LFOs raise revenue for the government, the hallmark of a tax.[19]

The most recent example of a court upholding an unconstitutional re-enfranchisement scheme requiring payment of LFOs to the government before regaining the right to vote concerns Florida's Amendment 4 and the Florida legislature's implementation statute, Senate Bill 7066 (SB 7066). The impact of felon disenfranchisement on Florida residents is particularly striking. Florida has more disenfranchised people than any other state at over 10 percent of its population, a disproportionate number of whom are people of color.[20] In response to this extraordinary injustice, Florida voters amended their state constitution by passing Amendment 4 in 2018 via ballot initiative. The amendment automatically re-enfranchised people convicted of most felonies[21] who successfully "completed all terms of [their] sentence[s]."[22] Notably, Amendment 4's language did not define the words "term" or "sentence." The Florida Supreme Court, at the request of Governor Ron DeSantis, interpreted the amendment to encompass all LFOs in January 2020.[23] Soon after, several Florida citizens who had been convicted of felonies sued, challenging the constitutionality of this interpretation. They alleged multiple constitutional violations, including that conditioning the right to vote on payment of LFOs violated the Twenty-Fourth Amendment.

After a lengthy legal battle, the case reached an *en banc* Eleventh Circuit. In a splintered decision, the Eleventh Circuit decided that requiring people convicted of felonies to pay money to the government before becoming eligible to vote did not violate the Twenty-Fourth Amendment.[24] However, this decision does not comport with the Amendment's history or jurisprudence. The Eleventh Circuit largely ignored the Amendment's broad language prohibiting conditioning the right to vote based on "[any] other tax," early Supreme Court

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Care Act's individual mandate in spite of the Anti-Injunction Act because the statute describes the exaction as a "penalty," indicating that Congress did not intend the Anti-Injunction Act to apply).

18. *See, e.g.*, *Johnson*, 624 F.3d at 750–51 (distinguishing between conditions on the right to vote for people convicted of felonies versus people not convicted of felonies).

19. *Jones II*, 975 F.3d 1016, 1038 (11th Cir. 2020).

20. Alexis Hancz, *A Year Later, Florida Needs to Revisit Felon Voting Rights*, MICH. DAILY (Oct. 5, 2021), https://www.michigandaily.com/opinion/columns/a-year-later-florida-needs-to-revisit-felon-voting-rights/ [https://perma.cc/N8QU-5YVK].

21. The re-enfranchisement clause does not apply to those convicted of "murder" or a "felony sexual offense." FLA. CONST. art. VI, § 4(a)–(b).

22. *Id.* § 4(a).

23. Advisory Op. to Governor re: Implementation of Amend. 4, The Voting Restoration Amend., 288 So. 3d 1070, 1081 (Fla. 2020).

24. *See Jones II*, 975 F.3d at 1039.

decisions expressly adopting this broad prohibition, and Congress's intent reflecting the same.

Despite this recent Eleventh Circuit decision, litigators can and should argue that re-enfranchisement schemes conditioning the right to vote on payment of fees to the government violate the Twenty-Fourth Amendment for four reasons. First, although felon disenfranchisement is widely accepted as constitutional, once a state chooses to enable re-enfranchisement, that scheme must adhere to the Constitution. This includes the Amendment's prohibition on poll taxes or any other tax. Second, fees and court costs that raise revenue for the government bear the necessary indicia to be categorized as "taxes," thus falling within the Amendment's purview. Third, the Amendment's drafters' intent supports a reading of the Amendment that prohibits conditioning the right to vote on payments to the government, including those that are explicitly called "poll taxes" and those masquerading as something other than a poll tax. Finally, early Supreme Court cases on the Amendment further support reading the law as a broad prohibition on conditioning the right to vote on money payments to the government.

I.
A HISTORICAL BACKGROUND: FELON DISENFRANCHISEMENT, THE TWENTY-FOURTH AMENDMENT, AND SUBSEQUENT SUPREME COURT DECISIONS

To give context to Florida's Amendment 4 and the unconstitutional practice of requiring people convicted of felonies to pay a fee in order to vote, it is necessary to understand the law leading up to this point in history. This Section provides a short background on felon disenfranchisement laws in America, the Twenty-Fourth Amendment, and Supreme Court decisions addressing poll taxes.

A. A Brief History of Felon Disenfranchisement in America

For millions of people, a felony conviction costs much more than physical freedom. It costs the ability to be heard. Jan Warren, who was sentenced to fifteen years in prison for a first-time offense, put it simply: "[T]he whole prison system is set up to alienate you from society, because now I can't vote. And without being able to vote, what politician is going to say, 'Well, Ms. Warren, you have a very good point and because you're one of my constituents I'm going to listen to you'?"[25]

Known as the "civil death," the practice of felon disenfranchisement has existed in the United States since its inception.[26] Because the Constitution grants states the ability to establish voter qualifications,[27] states have "broad powers to

25. Rebecca Perl, *The Last Disenfranchised Class*, NATION (Nov. 6, 2003), https://www.thenation.com/article/archive/last-disenfranchised-class/ [https://perma.cc/RAW5-YY79].

26. George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 101, 102 (2005).

27. U.S. CONST. art. I, §2.

determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns."[28] This "wide scope" enables consideration of criminal records.[29] By the Civil War, twenty-four states had promulgated statutes prohibiting people convicted of felonies from voting.[30] Felon disenfranchisement laws continued to expand during the Reconstruction and Jim Crow eras in an overt effort to prevent newly-freed Black Americans from fully participating in the "life of the nation."[31]

In the modern era, felon disenfranchisement statutes continue to permeate state laws. Nearly all states have some form of felon disenfranchisement law on record,[32] which has enormous impacts on individuals' lives. Approximately 5.17 million Americans are currently disenfranchised due to a felony conviction, nearly half of whom remain disenfranchised even after completing their prison term.[33]

Due to the laws' racist origins, it is unsurprising that felon disenfranchisement laws disproportionately impact Black and Brown communities, particularly in the Southern states.[34] In thirty-four states, Latinx communities are disenfranchised at a higher rate than the general population.[35] Black Americans of voting age are nearly four times more likely than the general population to be ineligible to vote due to a previous or current felony conviction.[36]

The continued disenfranchisement of people even after they have completed their prison sentence also greatly impacts individuals' ability to fully reintegrate into their communities.[37] Scholars who have studied the effect of felon disenfranchisement found that the inability to vote in elections may lead to othering, isolating, and recidivating.[38]

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28. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50–51 (1959).

29. *Id.* at 51.

30. Christopher Haner, *Felon Disenfranchisement: An Inherent Injustice*, 26 J. C.R. & ECON. DEV. 911, 912 (2013).

31. Brooks, *supra* note 26, at 857–59.

32. Chung, *supra* note 10 (Maine, Vermont, Washington, D.C., and Puerto Rico have no restrictions on voting for people convicted of felonies).

33. Christopher Uggen, Ryan Larson, Sarah Shannon & Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENT'G PROJECT (Oct. 30, 2020) https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/ [https://perma.cc/3KU8-BV28].

34. *Id.* (estimating that more than one in seven Black Americans are disenfranchised in Alabama, Florida, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming).

35. *Id.*

36. *Id.* (estimating that 1.8 million Black Americans are disenfranchised due to a felony conviction).

37. Alice E. Harvey, *Ex-Felon Disenfranchisement and its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1171 (1994).

38. *See, e.g.*, Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 732 (1973) (denying voting rights to people who have completed their sentences "is likely to reaffirm feelings of alienation and isolation, both detrimental to the reformation process").

Finally, felon disenfranchisement has an enormous potential impact on the outcome of elections, as exemplified by Florida. In 2000, Al Gore lost the state of Florida in the presidential election by 537 votes, giving George W. Bush the presidency.[39] Some scholars speculate that if the nearly six hundred thousand people disenfranchised due to felony convictions in the state were permitted to vote, the election would have come out the other way.[40]

Despite felon disenfranchisement laws causing deep harm to millions of people, they remain a legal way for states to punish people convicted of felonies.

B. The Twenty-Fourth Amendment and Subsequent Supreme Court Decisions

As with felon disenfranchisement laws, poll taxes have existed in the United States since its founding.[41] Carried over from the British concept of property ownership as a prerequisite to voting, poll taxes require an individual to pay a fee to the government in order to participate in elections.[42] However, poll taxes had all but disappeared from state laws by the mid-nineteenth century.[43] It was not until the end of the Civil War and the ratification of the Fifteenth Amendment that poll taxes reemerged.[44] During Reconstruction, many Southern states passed laws aimed at suppressing the votes of poor and newly freed Black people, including poll taxes and literacy tests.[45] These laws had their desired effect. Although poll taxes cost a relatively small amount, typically between one to two dollars, that sum was nevertheless prohibitory for many low-income voters.[46] After Southern states adopted the poll tax during Reconstruction, the voting rate dropped by 35 percent in presidential elections between 1889 and 1909.[47]

Until the Twenty-Fourth Amendment was ratified, courts upheld poll taxes as a valid exercise of state power to regulate elections. In 1937, the Supreme Court unanimously upheld a Georgia poll tax, rejecting the claim that it violated the Equal Protection Clause of the Fourteenth Amendment.[48] Because states confer the "privilege of voting" on citizens, the Court found that states may

39. *On this Day, Bush v. Gore Settles 2000 Presidential Race*, NAT'L CONST. CTR. (Dec. 12, 2019), https://constitutioncenter.org/blog/on-this-day-bush-v-gore-anniversary [https://perma.cc/AB2H-7AB6].

40. *See* Perl, *supra* note 25.

41. David Schultz & Sarah Clark, *Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment*, 29 QUINNIPIAC L. REV. 375, 381 (2011).

42. *Id.* at 378.

43. Deborah N. Archer & Derek T. Muller, *The Twenty-Fourth Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxiv/interps/157 [https://perma.cc/3H9P-8Z9].

44. *Id.*

45. *Id.* at 386.

46. *Id.*

47. *Id.* at 390.

48. *See* Breedlove v. Suttles, 302 U.S. 277, 283 (1937).

"condition suffrage as [they] deem[] appropriate," providing the laws adhere to the "Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution."[49] As there was no constitutional amendment or provision that prohibited levying a tax as a prerequisite to voting at the time, the Court held that states may properly use their power to enact and collect poll taxes.[50] In 1951, the Court came to the same conclusion in a similar challenge to Virginia's poll tax.[51]

However, as the civil rights movement gained traction in the 1950s, calls to abolish poll taxes grew. At the encouragement of President John F. Kennedy, Senator Spessard Holland of Florida proposed a constitutional amendment that would prohibit the use of poll taxes as a prerequisite to voting in federal elections.[52] The amendment passed in the House and Senate relatively quickly, and by 1964, three-fourths of the states ratified it.[53] On February 4, 1964, President Lyndon B. Johnson certified that the Twenty-Fourth Amendment had been properly ratified, officially adding it to the United States Constitution.[54] The Amendment states, in relevant part, that the right to vote in a federal election "shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."[55]

Despite the newly-minted Amendment, some states attempted to circumvent the law by adjusting their "pay-to-vote" systems. Shortly after the states ratified the Twenty-Fourth Amendment, Virginia passed a law that offered voters a choice: pay the tax or file a notarized or witnessed certificate of residence at least six months before each election, in addition to presenting the certificate at the polling place. The Supreme Court unanimously struck down Virginia's law in *Harman v. Forssenius*, holding that the law imposed a "material requirement" on voters.[56] The Court stated that "the poll tax is abolished absolutely as a prerequisite to voting, and *no equivalent or milder substitute may be imposed*."[57]

The following year, in *Harper v. Virginia Board of Elections*, voters challenged Virginia's poll tax to vote in state and local elections under the First and Fourteenth Amendments.[58] Applying the Fourteenth Amendment, the

49. *Id.*

50. *Id.* at 283–84.

51. *See* Butler v. Thompson, 341 U.S. 937 (1951) (affirming the Eastern District of Virginia's ruling that a poll tax did not violate the Equal Protection Clause).

52. Brendan F. Friedman, *The Forgotten Amendment and Voter Identification: How the New Wave of Voter Identification Laws Violates the Twenty-Fourth Amendment*, 42 HOFSTRA L. REV. 343, 348 (2013).

53. *Id.* at 349.

54. *24th Amendment Becomes Official*; *Johnson Hails Anti-Poll Tax Document at Ceremonies*, N.Y. TIMES (Feb. 5, 1964), https://www.nytimes.com/1964/02/05/archives/24th-amendment-becomes-official-johnson-hails-antipoll-tax-document.html [https://perma.cc/APR6-KY6D].

55. U.S. CONST. amend. XXIV.

56. Harman v. Forssenius, 380 U.S. 528, 541–42 (1965).

57. *Id.* (emphasis added).

58. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).

Supreme Court held that the fundamental right to participate in the political process, whether federal or state, cannot be abridged based on one's inability to pay a fee: "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor" and making "the affluence of the voter or *payment of any fee* an electoral standard" is unconstitutional.[59]

Harman and *Harper* clarify that states cannot condition the right to vote in any election—federal or state—on payment of a fee or any other substitute. Since deciding these two cases, the Supreme Court has not used the Twenty-Fourth Amendment to invalidate any election practice.[60] Despite the seemingly clear rules the Court set in *Harman* and *Harper*, states continue to impose other types of financial conditions on voting without labeling them a "tax."[61]

II.
RECENT DEVELOPMENTS IN FLORIDA'S FELON RE-ENFRANCHISEMENT SCHEME

The past several years have brought significant changes to Florida's structures for re-enfranchising people convicted of felonies. This Section discusses Florida's Amendment 4, which aimed to automatically re-enfranchise people convicted of most felonies after they completed their sentence, the Florida legislature's change to Amendment 4 to read payment of LFOs into "all terms of [their] sentence," and the line of litigation that challenged this redefinition.

A. Florida's Amendment 4 purported to automatically re-enfranchise people convicted of most felonies upon completion of their sentence.

Florida has the highest number of people disenfranchised due to felony convictions of any state in the nation at approximately 1.4 million.[62] Due to the substantial impact of mass incarceration on minority communities, the disenfranchised population in Florida contains a disproportionate number of Black and Latinx people.[63]

Prior to 2018, the only avenue to re-enfranchisement in Florida was through petitioning the Executive Clemency Board.[64] For several years, executive clemency worked well, enabling thousands of people to regain their voting rights. Between 2007 and 2011, the Executive Clemency Board restored civil

59. *Id.* at 665–68 (emphasis added).

60. Schultz & Clark, *supra* note 41.

61. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189 (2008) (upholding an Indiana law requiring voters to obtain a government-issued ID, which required a fee, to vote).

62. *See Number of People by State Who Cannot Vote Due to a Felony Conviction*, PROCON (July 30, 2021), https://felonvoting.procon.org/number-of-people-by-state-who-cannot-vote-due-to-a-felony-conviction/#all [https://perma.cc/K3QZ-64F8]; Alexander Klueber & Jeremy Grabiner, Voting Rights Restoration in Florida: Amendment 4 – Analyzing Electoral impact & Its Barriers, at 3 (Apr. 2020) (Policy Analysis Excercise, Harv. Kennedy Sch. Gov't).

63. *See* Klueber & Grabiner, *supra* note 62.

64. FLA. CONST. art. 4 § 8.

rights to nearly 150,000 people convicted of felonies.[65] However, when Republican Governor Rick Scott took office in 2011, he undid many of his predecessor's reforms and added new requirements, such as completion of prison, probation, and parole terms and a minimum five-year waiting period before being eligible to apply for clemency.[66] These changes made the path to re-enfranchisement more difficult and resulted in only about three thousand people successfully regaining their right to vote from 2011 to 2018.[67] This disparity in outcomes was so partisan that a federal district court judge declared it unconstitutional.[68]

Unsatisfied with leaving re-enfranchisement to the executive and legislative branches[69] and the courts,[70] Florida voters chose to create reform through a ballot initiative. The campaign for Amendment 4 began with grassroots organizations in 2014, which obtained over 800,000 signatures in support of putting felon re-enfranchisement on the ballot.[71] In 2018, Floridians voted overwhelmingly in favor of the amendment, passing it with 64 percent of the vote.[72] The amendment automatically re-enfranchised people convicted of most felonies after the individual completed "all terms of [their] sentence including parole or probation."[73] Critically, the amendment's text did not specify whether the "terms of sentence" included payment of LFOs.

Shortly after Florida voters passed Amendment 4, Governor Ron DeSantis announced that the Florida legislature must pass an implementation statute in order for the amendment to take effect.[74] However, proponents of the measure asserted that the amendment's language was self-executing,[75] and some members of the legislature expressed hesitation at interpreting the amendment

65. Michael Morse, *The Future of Felon Disenfranchisement Reform: Evidence from the Campaign to Restore Voting Rights in Florida*, 109 CALIF. L. REV. 1143, 1149–50 (2021).

66. *Id.*

67. *Id.*

68. *See* Hand v. Scott, 315 F. Supp. 3d 1244, 1299–1308 (holding Florida's clemency process violated the First Amendment's prohibition on viewpoint discrimination and the Fourteenth Amendment's Equal Protection Clause).

69. *See, e.g.*, Expert Report of J. Morgan Kousser, Ph.D. at app. 114 tbl.7, *Jones II*, 975 F.3d 1016, 1025 (11th Cir. 2020) (listing Florida bills and resolutions on the rights of people with felony convictions from 1998 to 2018).

70. *See, e.g.*, Johnson v. Governor of Florida, 405 F.3d 1214, 1223–25 (11th Cir. 2005) (en banc) ("Florida's felon disenfranchisement provision is constitutional because it was substantively altered and reenacted in 1968 in the absence of any evidence of racial bias.").

71. Gilda Daniels, *Democracy's Destiny*, 109 CALIF. L. REV. 1067, 1091–92 (2021).

72. *Id.*

73. The re-enfranchisement clause does not apply to those convicted of "murder" or a "felony sexual offense." FLA. CONST. art. VI, § 4(a)–(b).

74. *Florida Amendment 4, Voting Rights Restoration for Felons Initiative (2018)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Amendment_4,_Voting_Rights_Restoration_for_Felons_Initiative_(2018) [https://perma.cc/43UP-GLLB].

75. *See, e.g.*, Daniel Rivero, *Amendment 4 Passed. Will It Actually Get Implemented?*, WLRN (Nov. 8, 2018), https://www.wlrn.org/post/amendment-4-passed-will-it-actually-get-implemented [https://perma.cc/FTH4-987E] (quoting Howard Simon, a drafter of Amendment 4, that "the language that we wrote . . . is as clear as it could be, and it's self-executing")

without consulting its drafters or election supervisors.[76] Despite the opposition, the Florida legislature passed SB 7066, which purported to implement Amendment 4, largely along party lines.[77] The bill defined "all terms of sentence" to mean any terms contained in the sentencing document, including imprisonment, probation and parole, and LFOs, which encompass restitution, fines, fees, and costs.[78]

Upon Governor DeSantis's request, the Supreme Court of Florida issued an advisory opinion affirming the validity of SB 7066, including that "all terms of sentence" encompasses LFOs.[79] In effect, this prevented nearly a million otherwise-eligible citizens from voting unless they paid the government money.

B. Jones v. DeSantis *on the Twenty-Fourth Amendment: Requiring people to pay criminal fees to the government before being able to vote is an unconstitutional poll tax.*

After the Florida legislature passed SB 7066, several indigent persons with felony convictions challenged the constitutionality of Florida's pay-to-vote system.[80] The plaintiffs asserted, among other arguments, that the re-enfranchisement scheme was unconstitutional under the Twenty-Fourth Amendment because it required them to pay money to the government in order to regain access to the franchise. In October 2019, the United States District Court for the Northern District of Florida issued a preliminary injunction, holding that Florida's "pay-to-vote" scheme was an unconstitutional classification of wealth discrimination.[81]

In February 2020, a three-judge panel of the Eleventh Circuit affirmed.[82] The court found that Florida's pay-to-vote scheme failed rational-basis review as applied to indigent persons,[83] and may also fail as applied to all persons with felony convictions if "a substantial enough proportion" of them genuinely "cannot pay."[84]

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76. *See, e.g.*, Roy de Jesus, *Amendment 4 Could Be Delayed 60 Days, DeSantis Says*, SPECTRUM NEWS (Dec. 14, 2018), https://www.baynews9.com/fl/tampa/news/2018/12/14/amendment-4-could-be-delayed-60-days--desantis-says [https://perma.cc/RPV9-65V3] (quoting Florida Senate President Bill Galvano, a Republican, who stated that "[b]y all accounts, there's no action even required for [Amendment 4's] implementation").

77. *See* Morse, *supra* note 65, at 1171–72.

78. *See* FLA. STAT. § 98.0751(2)(a).

79. *See* Advisory Op. to Governor re: Implementation of Amend. 4, The Voting Restoration Amend., 288 So. 3d 1070, 1081 (Fla. 2020).

80. *See* Jones v. DeSantis, 410 F. Supp. 3d 1284, 1310 (N.D. Fla. 2019). The plaintiffs also challenged the re-enfranchisement scheme under the Fourteenth Amendment on Equal Protection and Due Process grounds. While these arguments are essential to attacking most unconstitutional felon re-enfranchisement schemes, this Note focuses on the plaintiffs' Twenty-Fourth Amendment claim.

81. *Id.* at 1310.

82. Jones v. Governor of Florida, 950 F.3d 795, 807 (11th Cir. 2020).

83. *Id.* at 810–13.

84. *Id.* at 814.

With the preliminary injunction still in place, the District Court for the Northern District of Florida in *Jones v. DeSantis* (*Jones I*) held an eight-day bench trial to analyze the constitutional claims fully.[85] On May 24, 2020, the court entered a permanent injunction, barring Florida from prohibiting formerly incarcerated people convicted of felonies from voting if the only incomplete aspect of their sentence was paying LFOs.[86] The court's analysis focused on whether different types of LFOs constituted taxes and engaged in only a cursory discussion of the Twenty-Fourth Amendment's broader intent and the Supreme Court's poll tax jurisprudence.[87] Even still, the court determined that court costs and fees (generally referred to as "fees") imposed a prohibited "tax" under the Twenty-Fourth Amendment.[88]

Although Florida's voting re-enfranchisement scheme did not label LFOs as taxes, the district court found that fees are, in effect, taxes and fall under the "other taxes" clause of the Twenty-Fourth Amendment.[89] The court relied primarily on the Supreme Court's analysis of taxes and penalties in *National Federation of Independent Businesses v. Sebelius*.[90] In that case, the Court held that an exaction may be a tax if it functions as such, even if the statute does not explicitly name the exaction a "tax."[91] Accordingly, something is a tax if it is an unvoluntary contribution that "produces at least some revenue for the Government."[92] Additionally, the Court provided three factors used to determine whether exactions are taxes: (1) the size of the exaction, focusing on whether the fine is prohibitory; (2) scienter (i.e., intentional infractions); and (3) what government agency enforces the exaction.[93]

Under this framework, the district court in *Jones I* found that fees were taxes, while restitution and fines were not.[94] Fees associated with operating the criminal legal system were taxes because they raised revenue for the government, and the *Sebelius* factors weighed in favor of them being taxes.[95] In Florida, every criminal defendant who is convicted, accepts a plea deal, or is

85. Jones v. DeSantis (*Jones I*), 462 F. Supp. 3d 1196, 1203 (N.D. Fla. 2020), *hearing en banc ordered sub nom.* McCoy v. Governor of Florida, No. 20-12003-AA, 2020 WL 4012843 (11th Cir. 2020), *and rev'd and vacated sub nom.* Jones v. Governor of Florida, 975 F.3d 1016 (11th Cir. 2020).

86. *Id.* at 1250.

87. *See id.* at 1231–34.

88. *Id.* at 1204. The court also held that requiring people convicted of felonies to pay fines, fees, costs, and restitution before re-registering to vote violated the Equal Protection Clause. Again, although the Equal Protection Clause is crucial to felon disenfranchisement claims, this Note focuses on the court's analysis of conditioning the fundamental right to vote on payment of fees and court costs as a violation of the Twenty-Fourth Amendment.

89. *Id.* at 1233.

90. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 543–54 (2012).

91. *Id.* at 564–66; *id.* at 662 (Scalia, J., dissenting).

92. *Id.* at 564 (majority opinion) (citing U.S. v. Kahriger, 345 U.S. 22, 28 n.4 (1973)); *id.* at 662 (Scalia, J., dissenting).

93. *Jones I*, 462 F. Supp. 3d at 1232–33.

94. *Id.* at 1232.

95. *Id.* at 1233.

otherwise not adjudged guilty but also not exonerated, is ordered to pay fees to the state.[96] These fees fund the criminal legal system, meeting the "essential feature" of a tax.[97] Additionally, the court opined that most fees are not prohibitory.[98] Finally, the state assesses them regardless of culpability and collects them in the same manner as other civil debts or taxes.[99] As a result, the court held that fees function as taxes and that conditioning re-enfranchisement on payment of them violated the Twenty-Fourth Amendment's prohibition on conditioning the right to vote on "other taxes."[100]

C. Jones v. Governor of Florida *reverses* Jones v. DeSantis*, finding that LFOs are not taxes, and the Twenty-Fourth Amendment did not apply.*

Florida appealed the district court's decision to the Eleventh Circuit, challenging in part the lower court's findings regarding the Twenty-Fourth Amendment violation. After hearing the appeal *en banc*, the Eleventh Circuit held in *Jones v. Governor of Florida* (*Jones II*) that Amendment 4, as interpreted and implemented by SB 7066, did not violate the Twenty-Fourth Amendment.[101] Specifically, the Eleventh Circuit found that, despite raising revenue for the government, court costs and fees are not taxes and therefore requiring payment of LFOs does not violate the Twenty-Fourth Amendment.[102] Similar to the district court, the Eleventh Circuit focused primarily on whether fees are taxes and largely eschewed discussing the Twenty-Fourth Amendment's intent and the Supreme Court's poll tax jurisprudence.[103]

The Eleventh Circuit reasoned that penalties are meant to punish an unlawful act or omission and outlined several aspects of court fees that indicate they are punishments, not taxes.[104] First, fees are part of a defendant's sentence, the main purpose of which is to punish.[105] If a defendant cannot pay a portion of their LFOs, the court may convert the LFO into a community service requirement, indicating that the purpose is to punish, not raise revenue.[106] Second, the court found that like "fines and restitution, fees . . . are also linked to culpability."[107] Florida imposes higher fees on those facing felony charges than misdemeanor or traffic violation charges.[108] Third, fees are only imposed

96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Jones II*, 975 F.3d 1016, 1049 (11th Cir. 2020).
102. *Id.* at 1039.
103. *See id.* at 1037–39.
104. *Id.* at 1038–39 (quoting Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 567 (2012); United States. v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996)).
105. *Id.* at 1038.
106. FLA. STAT. § 938.30.
107. *Jones II*, 975 F.3d at 1038.
108. *Id.* at 1039.

on defendants who are convicted or who have their adjudication of guilt withheld.[109] Finally, the court cited Supreme Court precedent where similar exactions were determined to be penalties, not taxes.[110]

Additionally, the Eleventh Circuit reasoned that the *Sebelius* factors weighed in favor of fees being penalties, not taxes. The court focused primarily on the second factor, scienter, finding that a defendant's mental state is instructive of whether exactions are penalties or taxes for three reasons.[111] First, exactions imposed only on those who knowingly violate the law suggest a penalty, not a tax.[112] Second, a "criminal prosecution" to collect an exaction is "suggestive of a punitive sanction."[113] Finally, "an exaction is likely a tax when the behavior to which it applies is lawful."[114]

Furthermore, although fees bear the essential feature of a tax by raising revenue for the government, the Eleventh Circuit did not find this to be dispositive. Other forms of LFOs also raise revenue, including criminal fines, which vary in amount based on the particular crime.[115] Additionally, although fees do not vary based on the severity of the punishment imposed, the court held that they are penalties because they are part of a criminal sentence.[116]

Despite the Eleventh Circuit's reasoning in *Jones II*, the Twenty-Fourth Amendment's history, intent, and jurisprudence necessitate the conclusion that the holding in *Jones II* is anomalous. Litigators therefore have a viable argument that similar schemes are unconstitutional.

III.
CHALLENGES AND SOLUTIONS TO USING THE TWENTY-FOURTH AMENDMENT AS A LEGAL STRATEGY POST-*JONES II* TO INVALIDATE FELON RE-ENFRANCHISEMENT SCHEMES THAT REQUIRE PAYMENT OF LFOS

As exemplified in *Jones II*, litigators who intend to use the Twenty-Fourth Amendment to challenge unconstitutional re-enfranchisement schemes will face significant challenges. This Section explores four arguments that litigators might use when alleging that requiring people to pay money to the government in the form of fees associated with a criminal sentence in order to vote violates the Twenty-Fourth Amendment.

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109. *Id.* (finding that, even if defendants have their adjudication of guilt withheld, they are still subject to the court's punitive authority such as probation, fines, and restitution).

110. *See, e.g.*, Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 781 (1994) (holding that a "so-called tax" on the possession of illegal drugs was in reality criminal punishment in part because the exaction was "conditioned on the commission of a crime"); United States v. Constantine, 296 U.S. 287, 295 (1935) (finding that a $1,000 excise imposed only on those who violated state liquor laws was a penalty, not a tax).

111. *See Jones II*, 975 F.3d at 1038.

112. *Id.*

113. *Id.*

114. *Id.* (quoting Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 565–68 (2012)).

115. *Id.*

116. *Id.*

The first step in this line of argumentation requires convincing a court that the Twenty-Fourth Amendment applies to re-enfranchisement schemes. While states are not compelled by law to reinstate people's right to vote, once they create and implement a re-enfranchisement scheme, that program must comport with the Constitution. Second, in order for the Amendment's prohibition on poll taxes or "any other tax"[117] to apply, at least some LFOs must be taxes. Fees bear many indicia of taxes under the Supreme Court's test in *Sibelius* and categorizing them as taxes is consistent with lower circuits' tax analyses. Third, the Twenty-Fourth Amendment's text and legislative history reveal that the drafters likely intended the Amendment to prohibit conditioning voting on not only taxes, but also on any other type of financial payment to the government. Finally, a survey of the Supreme Court's Twenty-Fourth Amendment and voting rights jurisprudence lends further support to the notion that the Amendment is to be interpreted and applied broadly, prohibiting conditioning the right to vote on financial payments to the government.

A. Re-enfranchisement schemes, while not required by Richardson v. Ramirez*, must still comply with the Constitution when designed and implemented.*

When addressing felon re-enfranchisement schemes, advocates must confront the threshold question of whether there is even a fundamental right at issue. Because *Richardson v. Ramirez* gives states the ability to strip people convicted of felonies of the right to vote, some courts reason that there is no longer a right to protect.[118] However, while states are not required to provide a path to re-enfranchisement, states that do so must write their re-enfranchisement schemes in a way that complies with the Constitution. Although states may prevent people convicted of felonies from voting for a time, if states condition the right to vote on payment of money to the government, that scheme is unconstitutional.

Inherent in Florida's rationale for the re-enfranchisement scheme is the notion that citizens convicted of felonies cannot make the same claims to fundamental constitutional rights as citizens who have not been convicted of felonies. Indeed, both the district court in *Jones I* and the Eleventh Circuit in *Jones II* stated that the scheme of requiring people to pay LFOs before voting would be unconstitutional on its face but for the fact that the group of people to which the requirement applied had been convicted of felonies.[119] Significantly, the Eleventh Circuit held that because "poll taxes bear 'no relation' to voter qualifications" and introduce a "capricious or irrelevant factor" for voting, it remains a "per se" constitutional violation for a state to "make[] the affluence of

117. U.S. CONST. amend. XXIV.

118. *See, e.g.*, Harvey v. Brewer, 605 F.3d 1067, 1080 (9th Cir. 2010); Johnson v. Bredesen, 624 F.3d 742, 751 (6th Cir. 2010).

119. *See Jones I*, 462 F. Supp. 3d 1196, 1234 (N.D. Fla. 2020); *Jones II*, 975 F.3d at 1041–42.

the voter or payment of any fee an electoral standard."[120] Even still, the Eleventh Circuit stated that people convicted of felonies "cannot complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted under the terms of *Richardson*."[121] Because states may "unquestionably" strip people convicted of felonies of the right to vote, the Eleventh Circuit found that the Florida legislature's decision to require those individuals to pay LFOs before regaining the right to vote does not violate the Twenty-Fourth Amendment.[122]

Notably, however, the Eleventh Circuit rejected Florida's argument that disenfranchised people "have no cognizable Twenty-Fourth Amendment until their voting rights are restored."[123] At oral argument, Florida attempted to delineate between imposing a payment to the government on a pre-existing right to vote and imposing such a payment prior to accessing the right to vote.[124] Specifically, Florida stated that no fundamental right exists until that right has been restored at the discretion of the state.[125]

This argument, as noted by the Eleventh Circuit, fails for one very important reason: when dealing with a fundamental constitutional right, albeit one that has been temporarily removed or restricted, that right maintains or regains its fundamental nature when the state creates a path to restoration.[126] Because "voting remains a fundamental right," when all other conditions of their sentence have been fulfilled, people convicted of a felony cannot be deprived further of their right to vote for failure to pay LFOs.[127]

Although *Richardson v. Ramirez* gives states a "realm of discretion" in choosing whether to disenfranchise and re-enfranchise people convicted of felonies,[128] states do not have the authority to ignore constitutional principles when providing an avenue to regain access to the franchise. When states have the choice not to act, but nevertheless choose to act, those discretionary actions must be "in accord with the dictates of the Constitution."[129] Because the right to

120. *Jones II*, 975 F.3d at 1030–31 (quoting Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966)).

121. *Id.* at 1029 (quoting Harvey v. Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010) (internal quotes omitted)).

122. *Id.*

123. *Id.* at 1040.

124. Oral Argument at 8:38, *Jones II*, 975 F.3d (No. 20-12003) (https://www.ca11.uscourts.gov/oral-argument-recordings?title=20-12003&field_oar_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D=).

125. *Id.*

126. Madison v. State, 163 P.3d 757, 780 (Wash. 2007) (Alexander, C.J., dissenting).

127. *See* Bearden v. Georgia, 461 U.S. 660, 672–73 (1983); Williams v. Illinois, 399 U.S. 235, 241–42 (1970) (holding that the government cannot hold indigent criminal defendants in custody solely due to their inability to pay fines and fees, or interest on fines and fees).

128. *Jones II*, 975 F.3d at 1029.

129. Evitts v. Lucey, 469 U.S. 387, 401 (1985).

vote is fundamental and "preservative of all rights,"[130] felon re-enfranchisement schemes must comply with all typical protections of the right to vote.

If this were any other constitutional right applied to any other group of citizens, states would be far less likely to argue that suspending or removing the right strips it of its fundamental nature. Additionally, because of the social stigma associated with criminal convictions, the notion of requiring people convicted of felonies to be fully "rehabilitated" (i.e., have fulfilled their debt to society) before regaining the franchise used to not shock the conscience of the average American. However, as re-enfranchisement efforts gain popular support,[131] states may be less likely to utilize this argument, particularly given that continued disenfranchisement after a person has completed their prison term is othering, isolating, and may actually lead to recidivism.[132]

One of the only similarly situated rights of which states may temporarily or permanently deprive people convicted of felonies is the right to bear arms. The Second Amendment grants that the "right of the people to keep and bear Arms shall not be infringed."[133] That Amendment's origin dates back to English common law and became "fundamental" to Americans at the founding.[134] Although the Supreme Court has not specified a level of scrutiny for the right to bear arms, the Court noted in *District of Columbia v. Heller* that, as an enumerated right, the right to bear arms enjoys "core protection."[135] And yet, despite its fundamental status, states may unquestionably strip people convicted of felonies of the right to bear arms.[136]

The right to bear arms is distinguishable from the right to vote regarding felon disenfranchisement in two notable ways. First, while the right to bear arms also has deep roots in American society, the purposes of owning firearms are vastly different from the purposes of casting a vote in an election. Where bearing arms may be useful for personal protection or recreational activities, the ability to participate in elections is at the core of American democracy and is preservative of every other right afforded to Americans.[137] The Supreme Court

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

131. *See* Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, SENT'G PROJECT (July 28, 2021), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/ [https://perma.cc/HS8C-S4HB] (California restored voting rights for people on parole in 2020; Arizona removed the requirement to pay outstanding fines before rights are automatically restored for people convicted of first-time felony offenses after completion of court-imposed sentence in 2019; Delaware eliminated the requirement that people pay all LFOs after completion of their sentence in 2016; Maryland and Nevada restored voting rights to persons on probation and parole in 2016 and 2019, respectively; New York restored voting rights to people on parole in 2021).

132. *See* Harvey, *supra* note 37, at 1171.

133. U.S. CONST. amend. II.

134. District of Columbia v. Heller, 554 U.S. 570, 593 (2008).

135. *Id.* at 634. *See also* N.Y. State Rifle & Pistol Ass'n v. Bruen, 124 S. Ct. 2111 (2022) (reaffirming that balancing tests such as strict scrutiny or intermediate scrutiny do not apply in the Second Amendment context).

136. *Heller*, 554 U.S. at 626.

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

opined in *Wesberry v. Sanders* that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which . . . we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[138] Additionally, voting is one of the simplest ways citizens can engage in their community and advocate for positive change. For that reason, voting is particularly meaningful to incarcerated and previously incarcerated people. The restoration of voting rights gives previously incarcerated people "a chance to restore their voice once they've done their time."[139]

Second, the conditions under which the right to bear arms may be restored are closely related to the government purpose for removing the right in the first instance: public safety.[140] For example, Floridians convicted of a violent felony, such as murder, may only regain their right to own, purchase, and possess a firearm after the Florida Office of Executive Clemency reviews and approves their individual request for a pardon.[141] Conversely, the purported government purpose in requiring people to complete all terms of their sentence before re-enfranchisement is to grant only fully rehabilitated individuals the right to vote.[142] The Court in *Jones II* claimed that requiring people convicted of felonies to complete all terms of their sentence, including paying LFOs, is "highly relevant to voter qualifications" because it "promotes full rehabilitation of returning citizens and ensures full satisfaction of the punishment imposed for the crimes by which [people convicted of felonies] forfeited the right to vote."[143]

However, disenfranchisement does not, in fact, help achieve rehabilitation, particularly for those who have completed their prison sentences and are attempting to reintegrate themselves into their communities. Numerous scholars have found that continued disenfranchisement after release from prison is directly counterproductive to states' proffered goals of rehabilitation and reintegration.[144] Disenfranchisement further isolates and alienates a population

138. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

139. Joshua H. Winograd, *Let the Sunshine In: Floridian Felons and the Franchise*, 31 U. FLA. J.L. & PUB. POL'Y 267, 268 (2021) (quoting Lee Hoffman, *Military Vet on FL Poll Tax: 'I Felt the Rug Ripped from Under My Feet,'* CAMPAIGN LEGAL CTR. (July 17, 2019), https://campaignlegal.org/index.php/story/military-vet-fl-poll-tax-i-felt-rug-ripped-under-my-feet) [https://perma.cc/L872-DUFG].

140. *See* Nelson v. State, 195 So.2d 853, 855–56 (Fla. 1967) (finding that statutorily prohibiting people convicted of felonies from possessing firearms was justified by public safety).

141. FLA. OFF. OF EXEC. CLEMENCY, *Rules of Executive Clemency*, https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf [https://perma.cc/4J7W-PSQ2].

142. *Jones II*, 975 F.3d 1016, 1030–31 (11th Cir. 2020).

143. *Id.* at 1031.

144. *See, e.g.*, Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 408 (2012) (denying people convicted of felonies returning to society the right to vote is "counterproductive to the rehabilitative ideals of the criminal justice system"); Alice Malmberg, *Can Re-Enfranchisement Help Offenders Rehabilitate? Exploring the Relationship Between State Felon Disenfranchisement Laws and Three-Year Prison Recidivism Rates* (2018) (B.A. thesis, University of California, Santa Cruz) (on file

of Americans who have already been isolated and alienated from their loved ones and communities while in prison. This promotes a sense of estrangement, implying they are unfit to participate in the franchise, and may even lead to recidivism—quite the opposite of the government's claimed goal.[145]

Furthermore, requiring payment of LFOs is not germane to voter qualifications. The Court in *Harper* held that "wealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."[146] Additionally, the available data on the financial status of people convicted of felonies strongly suggests that most people with outstanding LFOs are "unable, not unwilling, to pay their debt."[147] Therefore, withholding the right to vote will not aid in their rehabilitation; it will merely inhibit their ability to meaningfully participate in the franchise.

While not the focus of this Note, it is worth mentioning the similarities between requiring people convicted of felonies to pay fees before exercising the right to vote and the unconstitutional conditions doctrine. Put plainly, the unconstitutional conditions doctrine limits the government's ability to withhold a benefit or privilege in exchange for a person relinquishing or not exercising a constitutional right.[148] This is true even when the state is not obligated to provide the benefit in the first instance—if the state offers the benefit, it cannot impermissibly condition the benefit on the beneficiary's surrendering of a constitutional right.[149] For example, the Supreme Court in *Sherbert v. Verner* found that a state impermissibly denied Sherbert's application for unemployment benefits after her employer terminated her because she refused to work on Saturday, the Sabbath Day of her faith.[150] The Court held that the government cannot force a person to "choose between following the precepts of [their] religion and forfeiting benefits . . . and abandoning one of the precepts of [their] religion [and receiving the government benefit]."[151] Such a choice "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[152]

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with the Dean's and Chancellor's Undergraduate Research Awards, University of California, Santa Cruz); Nancy Leong, *Felon Reenfranchisement: Political Implications and Potential for Individual Rehabilitative Benefits*, STAN. CRIM. JUST. CTR. (2006), https://law.stanford.edu/index.php?webauth-document=child-page/266901/doc/slspublic/NLeong_06.pdf [https://perma.cc/K3V9-E8LU]; Itzkowitz & Oldak, *supra* note 38, at 732 (denying voting rights to people who have completed their sentences "is likely to reaffirm feelings of alienation and isolation, both detrimental to the reformation process").

145. *See* Harvey, *supra* note 37, at 1171.

146. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 671 (1966).

147. Morse, *supra* note 65, at 1184, 1186.

148. *See* Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337, 337–40 (1989).

149. *See* Sherbert v. Verner, 374 U.S. 398, 404–05 (1963).

150. *Id.* at 399–400.

151. *Id.* at 404.

152. *Id.*

Requiring people to pay the government court costs and fees to regain the right to vote forces people convicted of felonies, who are often indigent, to face a similar choice. On one hand, they can use money to repay their LFOs that they may otherwise need for food, clothing, or other living expenses in exchange for regaining the right to vote. On the other hand, they can choose not to pay LFOs and forfeit the opportunity to participate in the franchise.[153]

Conditioning the right to vote on a money payment to the government is in direct contravention of the Twenty-Fourth Amendment. The fact that felon re-enfranchisement schemes are restoring a fundamental right to vote, as opposed to burdening a right that people may presently exercise, does not exempt the government from adhering to constitutional protections on the right to vote. While states are not required to provide a path to re-enfranchisement, this discretion does not give states free rein to impose impermissible conditions on constitutional rights.[154]

B. Criminal fees bear all the necessary indicia of taxes such that the Twenty-Fourth Amendment applies.

The next crucial step in using the Twenty-Fourth Amendment to combat conditioning the right to vote on financial payments to the government is defining fees and court costs as taxes, thus placing it under the Amendment's purview. While the Eleventh Circuit held that fees are not taxes for purposes of the Twenty-Fourth Amendment, this conclusion is at odds with the Supreme Court's, lower courts', and state courts' tax jurisprudence. Despite not being called "taxes," LFOs raise revenue for the government, bear little to no relation to culpability, and are assessed regardless of whether a defendant has been adjudged guilty.

As an initial matter, SB 7066 does not define fees as "taxes," nor is the word "tax" mentioned anywhere in Amendment 4 or its implementing statute.[155] However, this does not end the inquiry. The Supreme Court has long held that the legislature's chosen nomenclature does not determine whether an exaction is a tax. For example, in 1922, the Court found that an exaction Congress labeled a "tax" was, in actuality, a penalty, and therefore was not authorized by Congress's taxing power.[156] Similarly, in 1996, the Supreme Court looked to the function, rather than the label, of an exaction and found that the "tax" at issue in New York's law was functionally a penalty.[157] The Court reiterated this principle in

153. *See* Madison v. State, 161 Wash. 2d 85 (2007) (Alexander, C.J., dissenting) ("Moreover, those felons without resources may never be able to pay their LFOs. It is, after all, difficult for a felon to get a job after release from confinement.").

154. *Id.* at 404.

155. *See* FLA. STAT. § 98.0761 (2021); *Voter Restoration Amendment Text*, ACLU FLA., https://www.aclufl.org/en/voter-restoration-amendment-text [https://perma.cc/BJW8-98B2].

156. *See* Child Labor Tax Case, 259 U.S. 20, 38 (1922).

157. *See* United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 221–23 (1996).

2012, finding that courts should take a functional, rather than a formalistic, approach to evaluating whether an exaction is a tax.[158] Because the "constitutional question [is] not controlled by [the legislature's] choice of label,"[159] the fact that SB 7066 does not label fees as "taxes" does not preclude a finding that they are taxes for purpose of the Twenty-Fourth Amendment.

Under a functional approach, the "essential feature" of a tax is that it "produces at least some revenue for the Government."[160] Some LFOs do not purport to raise revenue; fines seek to punish, and restitution seeks to make victims whole. Fees, however, are intended to raise revenue to fund the criminal legal system.[161] Florida uses the fees assessed in criminal cases, including the "cost of prosecution," "public defender application fee," and "additional court costs," to fund its criminal legal system.[162] As the majority in *Jones I* and the dissent in *Jones II* noted, Florida "has chosen to pay for its criminal [legal] system in significant measure through fees routinely assessed against its criminal defendants."[163]

Additionally, the factors the Supreme Court laid out in *Sebelius*, specifically scienter, lead to the same conclusion.[164] Florida assesses fees regardless of whether a defendant has been adjudged guilty, and fees bear no relationship to a defendant's culpability. As the district court in *Jones I* noted, "[e]very criminal defendant who is convicted, and every criminal defendant who enters a no-contest plea of convenience or is otherwise not adjudged guilty but also not exonerated" must pay court fees.[165] Unlike fines, which are tailored for specific criminal convictions and vary based on the severity of the crime, fees are fixed amounts that Florida uses to fund its criminal legal system. For example, Florida charges a $225 fee in every felony case, $200 of which supports the clerk's office.[166] The remaining portion subsidizes the state's general revenue budget.[167] Further, criminal fees in Florida bear no relationship to culpability or level of offense. Florida collects fees from people who are convicted, as well as those who enter a *nolo contendere* plea or are otherwise not adjudged guilty.[168] A defendant who is found guilty of a violent offense typically owes the same

158. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563–64 (2012).

159. *Id.* at 564.

160. *Id. Cf.* People First of Alabama v. Merrill, 479 F. Supp. 3d 1200, 1216 (N.D. Ala. 2020) (finding that notary fees and costs required to comply with absentee voting requirements were not taxes under the Twenty-Fourth Amendment because they do not raise revenue for the government).

161. Ariel Jurow Kleiman, *Nonmarket Criminal Justice Fees*, 72 HASTINGS L.J. 517, 519 (2021).

162. Morse, *supra* note 65, at 1185–86.

163. *Jones II*, 975 F.3d 1016, 1073 (11th Cir. 2020) (Jordan, J. dissenting); *Jones I*, 462 F. Supp. 3d 1196, 1232–33 (N.D. Fla. 2020). *See also* FLA. CONST. art. V, § 14 (providing that all funding for clerks of court must be obtained through fees and costs, with limited exceptions).

164. *Jones I*, 462 F. Supp. 3d at 1232–33.

165. *Id.* at 1233.

166. *See id.* at 1248; FLA. STAT. § 938.05(1)(a).

167. *See Jones I*, 462 F. Supp. 3d 1196.

168. *Id.* at 1233.

amount in fees as a defendant who is charged with a comparatively minor, nonviolent offense.[169]

Additionally, lower courts' analyses of government exactions in the voting rights context further indicates that criminal fees fall under the Twenty-Fourth Amendment's purview. For example, the Northern District of Ohio found a law requiring voters who did not have a naturalization certificate to pay $250 to the U.S. Citizenship and Immigration Services would not survive strict scrutiny under the Twenty-Fourth Amendment. It "[p]ut[] a price on the right to vote," and the requirement bore "no relation to voting qualifications."[170] Conversely, courts that found government exactions were not taxes did so typically because the exaction did not raise revenue for the government,[171] did not affect the right to vote,[172] or did not mandate payment.[173]

Lower courts' treatment of other types of government exactions similarly leads to the conclusion that criminal fees are taxes. The Ninth and Tenth Circuits have used the four-factor "*Chateaugay/Lorber*" test to determine whether a government exaction is a tax.[174] While these circuits used the test in the bankruptcy context, its analysis is informative in the voting rights context in determining whether criminal fees are taxes. The Ninth and Tenth Circuits considered whether a debtor's contributions were (1) an involuntary pecuniary burden, regardless of name, laid upon the individuals or property; (2) imposed by, or under authority of, the legislature; (3) for public purposes, including the purposes of defraying expenses of government or undertakings authorized by it; and (4) under the police or taxing power of the state.[175] If the contributions met all four of these factors, they had the functionality of a tax and were treated as such.

Criminal fees would be considered taxes under the *Chateaugay/Lorber* approach as well. They satisfy the first factor because criminal defendants have no option but to pay fees when they are convicted or enter a plea of no contest.[176]

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169. *Id.*

170. Boustani v. Blackwell, 460 F. Supp. 2d 822, 826–27 (N.D. Ohio 2006).

171. *See, e.g.*, People First of Alabama v. Merrill, 479 F. Supp. 3d 1200, 1215–16 (N.D. Ala. 2020) (finding that notary fees and costs required to comply with absentee voting requirements were not taxes under the Twenty-Fourth Amendment because they did not raise revenue for the government).

172. *See, e.g.*, Curtis v. Oliver, 479 F. Supp. 3d 1039, 1141–42 (D.N.M. 2020) (holding that the state's discretionary recount provision requiring a fee did not affect the plaintiffs' right to vote).

173. *See, e.g.*, Black Voters Matter Fund v. Raffensperger, 478 F. Supp. 3d 1278, 1314 (N.D. Ga. 2020) ("The fact that any registered voter may vote in Georgia on election day without purchasing a stamp, and without taking any 'extra steps' besides showing up at the voting precinct and complying with generally applicable regulations, necessitates a conclusion that stamps are not poll taxes under the Twenty-Fourth Amendment prism.").

174. *See In re* Lorber Indus. of California, Inc., 675 F.2d 1062, 1066 (9th Cir. 1982); *In re* CF & I Fabricators of Utah, Inc., 150 F.3d 1293, 1298 (10th Cir. 1998); *In re* Sandia Tobacco Manufacturers, Inc., 2018 WL 4964295, *6 (Bankr. D.N.M. Oct. 12, 2018).

175. *In re CF*, 150 F.3d at 1298.

176. *See Jones I*, 462 F. Supp. 3d 1196, 1232–33 (N.D. Fla. 2020).

The Florida legislature's imposition of the fees satisfies the second factor.[177] The fees help pay for Florida's criminal legal system, as well as Florida's general revenue fund, satisfying the third factor.[178] And, Florida assesses criminal fees under its police power, satisfying the fourth factor.[179]

Despite the Eleventh Circuit's ruling, the *Sebelius* factors and lower courts' analyses of government exactions provide a viable argument to characterize fees as taxes for purposes of the Twenty-Fourth Amendment.

C. The Twenty-Fourth Amendment's drafters intended to eliminate disenfranchisement based on income.

As noted in Part II.C, the Eleventh Circuit essentially disregarded the Twenty-Fourth Amendment's original meaning in its analysis, following other federal courts of appeals that have addressed the Twenty-Fourth Amendment in felon re-enfranchisement cases.[180] However, the Amendment's text and history strongly indicate that its drafters intended the Amendment to prohibit using financial means as a qualification on voting. Leaning heavily on the legislative history and the drafters' intent may yield positive results, particularly when litigating before judges who prefer to interpret the Constitution from an originalist perspective.

Conditioning the right to vote on a money payment of any kind to the government is not in line with the spirit of the Twenty-Fourth Amendment or the drafters' intent. Although the Eleventh Circuit continually referred to the fact that felon disenfranchisement is perfectly legal and states are not obligated to re-enfranchise felons at all, as discussed above in Part III.A, re-enfranchisement schemes must still comport with the Constitution. Congress passed, and the states ratified, the Twenty-Fourth Amendment to end the practice of conditioning the right to vote paying money to the government. Felon re-enfranchisement schemes that condition regaining the right to vote on paying LFOs accomplish precisely what the Twenty-Fourth Amendment was intended to prohibit.

The plain text of the Amendment provides strong support that it should be interpreted broadly to include any type of wealth-based qualifications on the franchise. The Twenty-Fourth Amendment expressly prohibits any denial *or abridgement* of the right to vote for a "failure to pay *any poll tax or other tax*."[181] That the Amendment specifies that denial *or* abridgement of the right to vote is precluded indicates that Congress intended for the Amendment to cover both outright denial of the right to vote and methods of frustrating or discouraging

177. *See* FLA. CONST. art. V, § 14.

178. *See Jones I*, 462 F. Supp. 3d at 1233.

179. *See* FLA. CONST. art. V, § 14.

180. *See, e.g.*, Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010); Harvey v. Brewer, 605 F.3d 1067 (9th Cir. 2010).

181. U.S. CONST. amend. XXIV, § 1 (emphasis added).

citizens' participation in the franchise.[182] Further, the use of the phrase "any poll tax or other tax," specifically the words "any" and "other tax," strongly support the notion that Congress intended the Amendment to proscribe any financial barrier to the ballot box. The Supreme Court adopted this expansive reading of the Amendment in *Harman*, finding that it "nullifies sophisticated as well as simple-minded modes of impairing" the right to vote.[183]

Second, the Twenty-Fourth Amendment's history confirms that Congress intended to eliminate all wealth-based restrictions on voting regardless of their forms. Congress objected to the poll tax largely because it "exacted a price for the privilege of exercising the franchise," which is unrelated to one's ability to vote.[184] Further, Congress expressly stated it intended the Amendment to prevent the federal government "from setting up any substitute tax in lieu of a poll tax" and states from rebranding a poll tax as some other type of tax.[185]

Congress also aimed to increase voter participation by removing financial barriers to the ballot box that were unrelated to an individual's ability to meaningfully participate in the franchise. Significantly, debates in Congress leading up to passing the Amendment focused on how the poll tax prevented poor Americans from participating in the electorate by imposing a cost for exercising their fundamental right to vote.[186] Senator Holland of Florida offered his state as an example. He asserted there was "an immense increase in participation in voting" after abolishing the poll tax in Florida. This indicated that people who did not pay the poll tax were not irresponsible or disengaged citizens, but rather found the cost of the poll tax prohibitory. Thus, Senator Holland's assertion suggested the poll tax was unrelated to a person's ability to mindfully participate in elections.[187] Other members of the House echoed Senator Holland's sentiments that voter participation increased in states where the poll tax was removed.[188]

Transcripts from congressional debates around the Amendment likewise indicate its sponsors intended the "other tax" language to encompass any

182. *See* Brief of Amicus Curiae, Brennan Ctr. for Just. at NYU Sch. of Law, In Support of Plaintiffs-Appellants and Reversal at 6–7, *Bredesen*, 624 F.3d 742 (No. 08–6377).

183. Harman v. Forssenius, 380 U.S. 528, 540–41 (1965) (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939) (internal quotes omitted)).

184. *Id.* at 539 (discussing *Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives on Amendments to the Constitution to Abolish Tax and Property Qualifications for Electors in Federal Elections*, 87th Cong., 2d Sess. 14–22, 48–58 (1962) and *Hearings before a Subcommittee of the Senate Committee on the Judiciary on S.J. Res. 29*, 87th Cong., 2d Sess. 33 (1962)).

185. *Outlawing Payment of Poll or Other Tax as Qualification for Voting in Federal Elections*, H.R. Rep. No. 1821, 87th Cong., 2d Sess. at 5 (1962).

186. *See, e.g.*, *Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on Amendments to Abolish Tax and Property Qualifications for Electors in Federal Elections*, 87th Cong., 2d Sess. 14–22, 48–58 (1962); *Hearings before a Subcommittee of the Senate Committee on the Judiciary on S.J. Res. 29*, 87th Cong., 2d Sess. 33 (1962).

187. 108 CONG. REC. 5076, 4154 (1962) (statement of Senator Spessard Holland).

188. H.R. Rep. No. 1821, at 3 (1962).

payment to the government. This included fees not explicitly called a "tax" in the law or not technically within the definition of a "tax." Senator Holland specifically called attention to the language of "or other tax" in the proposed text, stating that the Amendment "would prohibit *any tax* that is above and beyond the poll tax, so called, being prescribed as a prerequisite for voting" in his statements to the Subcommittee on Constitutional Amendments in 1949.[189] Representative Gonzalez stated "[t]here should not be any price tag or any other kind of tag on the right to vote."[190] Representative Fascell understood the Amendment to clarify that "the payment of money, whether directly or indirectly, whether in a small amount or in a large amount, should never be permitted to reign as a criterion of democracy."[191] Representative Joelson affirmed the Amendment would target "areas in which American citizens are required to pay for the right to vote."[192] Representative Halpern described his hope that the Amendment would render the "undemocratic, feudal practice of placing a price tag on the right to vote" illegal.[193] Finally, Senator Javits stated the Amendment would eliminate any "encumbrance" bearing the "character" of the poll tax.[194]

The Twenty-Fourth Amendment's plain text and history strongly support an expansive reading of the Amendment as prohibiting conditioning access to the franchise on any financial obligation or any milder substitute. Congress intended that the Amendment fully unencumber the fundamental right to vote and divorce it from any overt financial requirement or one masquerading as an alternative procedure. Because Florida's re-enfranchisement scheme imposes a financial prerequisite on the right to vote, it imposes a poll tax within the meaning of the Twenty-Fourth Amendment.

D. The Supreme Court's and lower courts' voting rights jurisprudence further supports an expansive reading of the prohibition on poll taxes.

Although Supreme Court cases on the Twenty-Fourth Amendment are few in number, the Court mirrored Congress's intent to broadly prohibit conditioning the right to vote on payments to the government. Many federal courts have similarly adopted an expansive interpretation of the Amendment in voting rights cases.

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189. *A Joint Resolution Proposing an Amendment to the Constitution of the United States, Relating to the Qualifications of Electors: Hearing on S.J. Res. 34 Before a Subcomm of the Comm. of the Judiciary, United States Senate*, 81st Cong., 1st Sess. 3 (1949) (statement of Sen. Spessard Holland).

190. *Abolition of Poll Tax in Federal Elections: Hearing on H.J. Res. 404, 425, 434, 594, 601, 632, 655, 663, 670, & S.J. Res. 29 Before the Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong., 2d Sess. 15 (1962) (statement of Rep. Henry B. Gonzales).

191. 108 CONG. REC. 17657 (1962) (statement of Rep. Dante Fascell).

192. *See id.* at 17662 (statement of Rep. Charles Joelson).

193. *Id.* at 17661 (statement of Rep. Seymour Halpern).

194. *Id.* at 4155 (statement of Sen. Jacob Javits).

In *Harman v. Forssenius*, the Court found unconstitutional a Virginia statute that provided "in order to qualify to vote in federal elections one must pay either a poll tax or file a witnessed or notarized certificate of residence."[195] Unlike the poll tax, which could be submitted annually by mail, voters had to obtain the certificate from the county, get it notarized, and file it in person six months before the election.[196] The Court found this process to be "plainly cumbersome" by imposing "onerous procedural requirements which effectively handicap exercise of the franchise."[197]

The Court further found that the law constituted a "material requirement" on voters "solely because of [their] refusal to waive the constitutional immunity" against poll taxes guaranteed by the Twenty-Fourth Amendment. Therefore, it held the Virginia law "must fall under [the Amendment's] ban."[198] The law could not have been constitutional even if it imposed an equal or somewhat lesser burden on voters than the poll tax because "the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent of milder substitute may be imposed."[199] Although the certificate requirement was billed as a substitute for paying the poll tax and was not technically a tax, the Court concluded that it "serv[ed] the same function as the poll tax."[200] The requirement therefore "constitute[d] an abridgement of the right to vote in federal elections in contravention of the Twenty-Fourth Amendment."[201]

Although *Harman* is the only case in which the Supreme Court directly used the Twenty-Fourth Amendment to strike down a poll tax, other voting rights cases reflect an expansive interpretation of the Amendment. The Court in *Harper* struck down the same $1.50 poll tax at issue in *Harman* as it applied to state elections through the Fourteenth Amendment.[202] The Court rejected Virginia's argument that if the state can require everyone to pay a fee for a driver's license, it can require everyone to pay a poll tax for voting.[203] The Court noted that the state's interest with regard to voting is limited to the power to fix qualifications, and wealth is not germane to one's ability to vote.[204] Applying the Fourteenth Amendment, the Court held that states may not limit the right to vote to those with the ability or willingness to pay a fee.[205]

More recent lower court cases further reflect a broad application of the Twenty-Fourth Amendment. For example, in 2005, the Northern District of

195. Harman v. Forssenius, 380 U.S. 528, 529 (1965).
196. *Id.* at 541.
197. *Id.* at 541.
198. *Id.* at 542.
199. *Id.* (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).
200. *Id.*
201. *Id.* at 538.
202. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966).
203. *Id.* at 668.
204. *Id.*
205. *Id.*

Georgia found that a fee of twenty to thirty-five dollars to obtain a photo ID in order to vote in Georgia elections constituted a poll tax.[206] Although the fee could be waived in limited circumstances, the requirement "effectively place[d] a cost on the right to vote" because the small number of people potentially eligible for the waiver made the option "illusory."[207] The district court analogized the fee waiver option to the certificate of residency option in *Harman*. The process of obtaining a waiver also entailed obtaining a form and appearing at a government office in person, constituting a "burden on the right to vote."[208]

In response to this ruling, Georgia amended the law and made voter IDs available without a fee for the cards.[209] The plaintiffs from the original case brought another lawsuit, but the district court held in this second case that there was no Twenty-Fourth Amendment violation.[210] The court reasoned that, although the photo ID requirement placed a burden on the right to vote, Georgia had ameliorated the burden by making voter ID cards available at no cost.[211] The court further found that the fee associated with obtaining a birth certificate which voters could use to obtain their voter ID card "might plausibly approach being a poll tax."[212] However, the court did not find a Twenty-Fourth Amendment violation on those facts because the plaintiffs did not provide evidence that any particular voter would actually be required to incur the cost to vote.[213]

The Supreme Court adopted a similar line of reasoning two years later in *Crawford v. Marion County Election Board*. The Supreme Court in *Crawford* held that an Indiana law requiring that people have government-issued photo IDs to vote did not violate the Constitution.[214] Although the Court did not directly confront the Twenty-Fourth Amendment, it did briefly address the financial burdens on voting. The plurality opined that "if the State required voters to pay a tax or a fee to obtain a new photo identification," the requirement would fall under *Harper*'s prohibition.[215] Ultimately, the Court did not decide whether paying a fee to obtain documentation required to vote constituted a poll tax. It noted, however, that "the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates."[216] The Court also mentioned that Indiana lessened the burden on voters by providing for

206. *See* Common Cause/Georgia v. Billups (*Billups I*), 406 F. Supp. 2d 1326, 1367–69 (N.D. Ga. 2005).
207. *Id.* at 1367.
208. *Id.* at 1367, 1370.
209. *See* Common Cause/Georgia v. Billups (*Billups II*), 439 F. Supp. 2d 1294, 1352 (N.D. Ga. 2006).
210. *Id.* at 1354.
211. *Id.*
212. *Id.* at 1355.
213. *Id.*
214. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189–90 (2008).
215. *Id.* at 198.
216. *Id.* at 203 n.20.

"reasonable alternate documents" to birth certificates to prove identity at the ballot box.[217]

Crawford therefore implies that if plaintiffs can show that a large number of people must actually pay a fee and there are no reasonable alternatives, the fee could be construed as a poll tax. State courts' applications of the Twenty-Fourth Amendment have similarly found functional poll taxes where a payment to the government is required to vote and there is no reasonable alternative.[218]

Applying these principles to Florida's felon re-enfranchisement scheme demonstrates that criminal fees easily meet the threshold. The individual plaintiffs in *Jones II*, as well as those represented as part of the class, were all people convicted of felonies who were required to pay a fee before being able to vote.[219] Additionally, there was no alternative available to the plaintiffs, nor does one currently exist after the Eleventh Circuit's ruling. People convicted of felonies are forced to choose between paying fees to the government or abandoning their constitutional right to vote, "effectively plac[ing] a cost on the right to vote."[220]

Additionally, Florida's procedures to assess whether a person convicted of a felony has fulfilled their LFOs are even more "cumbersome" and "onerous" than those the Supreme Court found to be unconstitutional in *Harman*.[221] In *Harman*, prospective voters could either pay a fee or file a witnessed or notarized certificate of residence.[222] Under the re-enfranchisement scheme upheld in *Jones II*, people convicted of felonies must obtain their sentencing records through the County Clerk's office. Many offices charge people an additional fee for a copy of their judgment.[223] Additionally, information regarding the original amount of LFOs owed as well as the amount remaining is unreliable and often inconsistent.[224] A professional research team conducted a study of 153 randomly selected people convicted of felonies in Florida. Of those 153, "there were inconsistencies in the available information for all but 3."[225] Relying on flawed information is likely to result in "erroneous deprivation" of voting rights or even additional criminal prosecution.[226]

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217. *Id.* at 199 n.18.

218. *See, e.g.*, Milwaukee Branch of NAACP v. Walker, 357 Wis.2d 469, 851 (2014) (finding a poll tax where the state required a "payment to a government agency" for identifying documents necessary for voting); City of Memphis v. Hargett, 414 S.W.3d 88, 106 (Tenn. 2013) (upholding a law based on an exemption for an in-person voter who "is indigent and unable to obtain proof of identification without payment of a fee . . . including any fee associated with the documentation necessary to obtain a 'free' photo ID card").

219. *Jones I*, 462 F. Supp. 3d 1196, 1203 (N.D. Fla. 2020).

220. *Billups I*, 406 F. Supp. 2d 1326, 1369 (N.D. Ga. 2005).

221. *See* Harman v. Forssenius, 380 U.S. 528, 541–42 (1965).

222. *Id.* at 531–32.

223. *Jones I*, 462 F. Supp. 3d at 1220.

224. *Jones II*, 975 F.3d 1016, 1062–63 (11th Cir. 2020) (Martin, J., dissenting).

225. *Jones I*, 462 F. Supp. 3d at 1220.

226. *Id.* at 1062, 1064 (Martin, J., dissenting).

The Supreme Court's interpretations of the Twenty-Fourth Amendment, though few, provide strong support for an expansive reading of the Amendment. Those interpretations suggest it prohibits conditioning access to the franchise on any financial or other "material requirement" as a substitute for a financial obligation. Lower courts' interpretations of the Amendment counsel the same. The Court's early analysis of the Amendment sought to end any financial constraint on the right to vote, no matter what form it took. Court fees are a material requirement that abridges the right to vote.[227] They therefore plainly fall within the category of state action that the Twenty-Fourth Amendment prohibits.

CONCLUSION

Criminal convictions in the United States impose consequences that are greater and longer-lasting than a prison sentence. Continuing to disenfranchise people long after they reenter society only isolates and others them and delays reintegration into their communities. *Jones II* came to the wrong conclusion by ignoring the Twenty-Fourth Amendment's history and its drafters' intent. It also failed to engage in a full analysis of whether criminal fees constitute "taxes." Convincing courts that court fees and costs constitute impermissible poll taxes will not right the immense wrong that is felon disenfranchisement. However, it remains a viable path to begin undoing this injustice.

227. Ryan A. Partelow, *The Twenty-First Century Poll Tax*, 47 HASTINGS CONST. L.Q. 425, 460–61 (2020).