No. 19-14551

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KEVIN LEON JONES, et al.,
Plaintiffs-Appellants,

v.

RON DESANTIS, et al.,
Defendants-Appellees.

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

AMICUS BRIEF OF HONEST ELECTIONS PROJECT IN SUPPORT OF DEFENDANTS' PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Per Rule 26.1 and Circuit Rule 26.1, the Honest Elections Project certifies that the following is a complete list of interested persons:

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Honest Elections Project has no parent corporation, and no corporation owns 10% or more of its stock.

CIRCUIT RULE 35-5(C) STATEMENT

The Honest Elections Project adopts Defendants' Rule 35(b) and Circuit Rule 35-5(c) statement, namely:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of the decisions in this court: *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018); *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018); *Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: (1) whether Florida's felon reenfranchisement law, as applied to those who cannot afford to pay the financial terms of their sentences, is subject to heightened scrutiny, and (2) whether Florida's felon reenfranchisement law, as applied to those who cannot afford to pay the financial terms of their sentences, violates the Equal Protection Clause. Both of these questions are of utmost importance to the State of Florida, and the panel's resolution of them conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issues.

s/ Jeffrey M. Harris
Counsel for Honest Elections Project

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INTEREST OF AMICUS CURIAE*

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that voters put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It thus has a significant interest in this important case.

STATEMENT OF ISSUES

The Project adopts Defendants' statement of the issues that merit en banc consideration, namely:

1. Whether, as applied to felons unable to pay the financial terms of their sentences, heightened scrutiny applies to Florida law conditioning felon reenfranchisement on completion of all terms of sentence, which the Florida Supreme Court has determined includes financial obligations.

2. Whether, as applied to felons unable to pay the financial terms of their sentences, Florida law conditioning felon reenfranchisement on completion of all terms of sentence violates the Equal Protection Clause.

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* No party's counsel authored this brief in whole or in part; and no party, party's counsel, or person (other than amicus or its counsel) contributed money to fund this brief's preparation or submission. Counsel for all parties consent to the filing of this brief.

STATEMENT OF FACTS

The Project adopts Defendants' statement of facts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Florida has made the eminently reasonable policy decision that persons convicted of felonies should have their voting rights restored only after they have satisfied *all* terms of their sentences—including the term of incarceration, plus restitution, fines, fees, community service, and any other obligations. If, for example, a felon convicted of armed robbery has not yet paid court-ordered restitution to the victim of his crime, Florida could reasonably conclude that this person has not yet repaid his debt to society and does not deserve restoration of his voting rights. This choice is the State's to make. *See Richardson v. Ramirez*, 418 U.S. 24 (1974).

Notwithstanding this entirely reasonable basis for Florida's law, the panel found it likely unconstitutional and upheld a preliminary injunction enjoining its enforcement. The panel reached that conclusion only by applying the heightened scrutiny from Supreme Court precedents addressing "wealth discrimination." The Project respectfully submits that this holding was clearly erroneous as a matter of law. Even in their broadest applications, the wealth-discrimination precedents—which have themselves been criticized as being unfaithful to the text and history of the Fourteenth Amendment—have never been applied in circumstances like these. The panel's decision represents a substantial and unjustified expansion of those doctrines and should be reversed.

ARGUMENT

I. The panel clearly erred by extending wealth-discrimination precedents to an entirely new context.

Every time the government imposes a tax, fee, fine, penalty, or other exaction on the public, it creates a disparate impact based on wealth; any monetary exaction will fall harder on the indigent than the wealthy. But those disparities cannot themselves give rise to an equal-protection violation, or government would be unworkable. For example, "States are not forced by the Constitution to adjust all tolls to account for 'disparity in material circumstances.'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 123-24 (1996). "[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973).

The panel's core error was its invocation of heightened scrutiny based on "wealth discrimination" precedents that arose in very different contexts and simply do not fit here. The panel applied heightened scrutiny based on its conclusion that the Florida statute "implicates wealth discrimination both in the administration of criminal justice and in access to the franchise." Op. 41. But that holding is "nothing more than an amalgamation" of two different theories, each of which is meritless on its own. *Pacific Bell v. LinkLine Communications*, 555 U.S. 438, 452 (2009). "Two wrongs don't make a right." *Utah v. Strieff*, 136 S. Ct. 2056, 2065 (2016) (Sotomayor, J., dissenting).

The panel first suggested that heightened scrutiny was warranted based on precedents involving wealth discrimination in the "administration of criminal justice."

Op. 42-48. But the cited precedents address very different circumstances not present here. Many of those cases merely hold that indigent defendants cannot be excluded from critical aspects *of the judicial process* based on their inability to pay. *See*, *e.g.*, *Griffin v. Illinois*, 351 U.S. 12 (1956); *Mayer v. City of Chicago*, 404 U.S. 189 (1971). For example, if a criminal trial or appeal depends on access to a transcript and a criminal defendant cannot afford the transcript fee, cases like *Griffin* hold that the defendant may be entitled to a waiver of that fee.

But the Supreme Court has been clear in subsequent decisions that this line of cases is narrow and carefully circumscribed: "In denial-of-access cases challenging filing fees that poor plaintiffs cannot afford to pay, the object is an order requiring waiver of a fee *to open the courthouse door for desired litigation*, such as direct appeals or federal habeas petitions in criminal cases, or civil suits asserting family-law rights." *Christopher v. Harbury*, 536 U.S. 403, 413 (2002) (emphasis added). That is, the *Griffin* line of cases merely holds that "[t]he State cannot adopt procedures which leave an indigent defendant '*entirely cut off from any appeal at all*,' by virtue of his indigency, or extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.'" *Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (emphasis added); *see also Walker v. City of Calhoun*, 901 F.3d 1245, 1264 (11th Cir. 2018) (*Griffin* line requires a showing of a "judicial proceeding an indigent person *cannot* access").

The other cases cited by the panel hold that a defendant cannot be *incarcerated* based solely on an inability to pay certain fees. For example, cases such as *Bearden v. Georgia*, 461 U.S. 660, 671 (1983), hold that "poverty" cannot be the "sole justification for imprisonment" of a defendant. *See also Tate v. Short*, 401 U.S. 395 (1971) (imprisonment for failure to pay fine); *Williams v. Illinois*, 399 U.S. 235 (1970) (imprisonment beyond statutory maximum for failing to pay fine). But, once again, those cases are entirely inapplicable here. Plaintiffs do not dispute that their sentences—including any fines, fees, or restitution awards—were lawfully imposed, nor do they assert that they were incarcerated solely for failure to pay a monetary award. Cases like *Bearden*, *Tate*, and *Williams* simply do not speak to the question of whether a defendant's indigency prohibits making the completion of a lawful, validly imposed sentence a precondition to having other rights restored.

The panel's reliance on voting-rights cases like *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), fares no better. Op. 48-59. In *Harper*, the Court concluded that poll taxes for state elections violate the Equal Protection Clause. 383 U.S. at 666. The Court held that poll taxes cannot be imposed on *any* otherwise qualified voter—"whether the citizen … pays the fee or fails to pay it." *Id.* at 668; *see also id.* (explaining that the rule against poll taxes applies to "those unable to pay a fee to vote or who fail to pay"). Despite some lofty dicta about wealth discrimination, the Court's holding rested on its conclusion that "[v]oter qualifications have no relation to wealth nor to paying or not paying [a] tax." *Id.* at 666; *see also id.* at 668 ("Wealth … is not germane to

one's ability to participate intelligently in the electoral process."). The exact opposite is true, of course, for voter qualifications that "exclude some or all convicted felons from the franchise." *Richardson*, 418 U.S. at 53.

II. The panel clearly erred by refusing to require a showing of discriminatory intent in the wealth-discrimination context.

Finally, the panel erroneously rejected Florida's argument that the statute could not be found unconstitutional absent a showing of discriminatory intent. Op. 65-66. The panel held that cases such as *Washington v. Davis*, 426 U.S. 229, 239 (1976), were inapposite because those arose in the race context and "this is not a race case." Op. 66.

That analysis gets things exactly backwards. Racial discrimination is at the very "core of the Fourteenth Amendment," *Hunter v. Erickson*, 393 U.S. 385, 391 (1969), so it would be bizarre to allow a plaintiff to use a disparate-impact theory for a wealth-discrimination claim but not a race-discrimination claim. The concerns the Court raised in *Davis* regarding disparate-impact claims apply with full force here: "[a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Davis*, 426 U.S. at 248. After all, the Equal Protection Clause is not a panacea for perceived social or economic inequity; it seeks to "guarante[e] equal laws, not equal

results." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 273 (1979). In the years since *Davis* was decided, the Supreme Court has repeatedly required equal-protection claimants to show something more than the mere fact that state action has a harsher effect on them than on others. *See, e.g., Harris v. McRae,* 448 U.S. 297, 324 n.26 (1980); *Lewis v. Casey,* 518 U.S. 343, 375 (1996) (concurring opinion) (collecting cases).

In *M.L.B.*, the majority declined to hold as a categorical matter that discriminatory intent is *always* required in wealth-discrimination cases. But the Court expressly clarified that cases such as *Griffin* and *Williams* are limited to circumstances in which a statute "'exposes *only indigents*'" to some burden, thereby resulting in "different consequences [for] two categories of persons.'" *M.L.B.*, 519 U.S. at 127 (emphasis added). The challenged laws there "appl[ied] to all indigents and *[did] not reach anyone outside that class*." *Id.* (emphasis added).

Here, however, the challenged law imposes burdens far beyond just the indigent: *all felons*, regardless of their wealth, must satisfy *all terms* of their sentences (financial and otherwise) in order to have their voting rights restored. By its plain terms, the statute is not based solely—or even predominantly—on a person's wealth or indigency. That should be the end of the matter, as plaintiffs' theory here exceeds even the farthest outer limits of how the Supreme Court has applied the wealth-discrimination doctrine. This Court already recognized as much in *Walker*, emphasizing that the "sine qua non" of a wealth-discrimination claim is that "the State is treating the indigent and the nonindigent *categorically differently*." 901 F.3d at 1260 (emphasis added). "Only someone

who can show that the indigent are being treated systematically worse 'solely because of [their] lack of financial resources'—and not for some legitimate State interest—will be able to make out such a claim." *Id.* (cleaned up).

Finally, the *Griffin* and *Williams* lines of cases have drawn criticism for endorsing "an equalizing notion of the Equal Protection Clause that would … have startled the Fourteenth Amendment's Framers." *M.L.B.*, 519 U.S. at 138 (Thomas, J., dissenting). Beginning in cases like *Davis*, the Court "began to recognize the potential mischief of a disparate impact theory writ large, and endeavored to contain it." *Id.* At a minimum, this Court should be extraordinarily cautious before it extends these questionable doctrines to entirely new circumstances, as the panel did here. It is highly implausible that the Supreme Court would have endorsed such a "radical result[]" as invalidating Florida's commonsense law "with so little fanfare." *Walker*, 901 F.3d at 1262.

CONCLUSION

For all these reasons, and the reasons in Defendants' petition, this Court should grant rehearing en banc and reverse the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 29(b)(4) because it contains 1,977 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

s/ Jeffrey M. Harris
Counsel for Honest Elections Project
Dated: March 4, 2020

CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel.

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Dated: March 4, 2020