
YALE LAW & POLICY REVIEW

FLORIDA’S BAD FAITH PROSECUTIONS OF GOOD FAITH VOTERS

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“Failure to pay court fines and fees should never result in the deprivation of fundamental rights, including the right to vote.”¹

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1. *ABA Ten Guidelines on Court Fines and Fees*, AMERICAN BAR ASS’N 5 (Aug. 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf [<https://perma.cc/5BZS-3XC6>].

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INTRODUCTION

When I was a teenager, I was convicted of a felony in Florida and stripped of my right to vote before I was even old enough to cast a ballot.² I regained that right in 2018 when Florida voters approved the historic state constitutional amendment known as Florida’s “Amendment 4”.³ Amendment 4 ended life disenfranchisement for many people with past felony convictions like me who had served their sentence. Lawmakers, however, reacted to this historic amendment with a law known as SB 7066, which requires people with past felony convictions to make payments of legal financial obligations (LFOs) in order to receive Amendment 4 restoration regardless of indigency or the state’s inability to properly implement this LFO system.

My case had been closed nearly a decade ago, so I thought that I did not have any outstanding issues to worry about under SB 7066. I proudly registered the day Amendment 4 went into effect and voted for the first time a year later during the 2020 primary elections. It was one of my greatest memories, until it became a near nightmare. Months after voting, I

2. *Florida Amendment 4 to Return Felon’s Voting Rights: A Conversation with Angel Sanchez*, HARV. C.R.-C.L. L. REV. (Oct. 16, 2018), <https://harvardcrcl.org/florida-amendment-4-to-return-felons-voting-rights-a-conversation-with-angel-sanchez> [<https://perma.cc/H5S5-K2DL>].

3. *See* FLA. CONST. art. VI, § 4.

learned that I was apparently ineligible based on old court records showing I had unpaid court costs and fees from years earlier. I was in tears and afraid.⁴ I had spent years trying to turn my life around and my efforts suddenly did not matter, simply because I voted. After weeks of searching, I discovered proof of payments showing that the court records were wrong.⁵ I was one of the lucky ones.

Had I not found those proofs of payments from almost a decade prior, today I could be among the many returning citizen voters in Florida being subject to prosecution for mistakenly registering and voting while allegedly ineligible. Even if not prosecuted, I could be among the hundreds of thousands of returning citizens being threatened with arrest for any mistake in voting, whether that mistake is theirs or one in the state's own records (like in my situation).⁶ Florida's leaders created this issue when they failed to create a centralized voter information system with SB 7066, almost certainly knowing that a failure to do so would leave election

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4. I share this vulnerable moment in solidarity with others who may be feeling the same way. Sharing one's vulnerabilities related to stigma helps empower and centralize the humanity of others similarly impacted. It "[a]ttack[s] embedded preconceptions that marginalize . . . or conceal [the] humanity' of those impacted." See e.g., Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1653-55 (2019) (citing RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 43-45 (2001); and ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 15-16 (2003)); see also ERVING GOFFMAN, STIGMA: NOTES ONN THE MANAGEMENT OF SPOILED IDENTITY 19-20 (1963) (discussing how stigma cuts people off from society and themselves until someone else reveals having a similar stigma and supports them. It helps them feel human and normal).
 5. Brief for Florida Rights Restoration Coalition as Amicus Curiae Supporting Plaintiffs-Appellees, *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020); see also Letter from Fla. Div. of Elections on Response to Request for Advisory Opinion F-20-9 (Aug. 17, 2020), <https://dos.myflorida.com/media/703434/f-20-9-redacted-final-response-to-ao.pdf> [<https://perma.cc/2SNV-8JVB>].
 6. *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1220 (N.D. Fla. 2020) ("A group of well-trained, highly educated individuals—a professor specializing in this field with a team of doctoral candidates from a major research university—made diligent efforts over a long period to obtain information on 153 randomly selected felons. They found that information was often unavailable over the internet or by telephone and that, remarkably, there were inconsistencies in the available information for all but 3 of the 153 individuals." (citing credited expert Dr. Traci R. Burch)).

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officials and voters guessing about their eligibility.⁷ The state is now taking advantage of those voters that guessed wrong and is publicizing the arrests in ways that appear intended to intimidate the remaining tens of thousands of uncertain but otherwise eligible returning citizen-voters into not voting.⁸

Federal claims were filed against SB 7066 as soon as it went into law. In *Jones I*, the District Court entered a preliminary injunction against SB 7066 concluding that it was unconstitutional, and the Eleventh Circuit Court of Appeals applied heightened scrutiny and affirmed the preliminary injunction.⁹ Thereafter, in *Jones II*, the District Court held a six day trial on the merits and entered a permanent injunction against SB 7066.¹⁰ The Eleventh Circuit Court of Appeals heard the *Jones II* appeal en banc and overturned its prior ruling in *Jones I* and reversed the District Court's *Jones II* opinion on the merits.¹¹

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7. *Jones v. Governor of Fla.*, 975 F.3d 1016, 1110-11 (11th Cir. 2020) (Pryor, J., dissenting) [hereinafter *Jones II*] (discussing evidence at trial).
 8. 10 REASONS COURTS SHOULD TOSS FLORIDA'S FLIMSY 'VOTER FRAUD' PROSECUTIONS, BRENNAN CTR. (Jan. 11, 2023), <https://www.brennancenter.org/our-work/research-reports/10-reasons-courts-should-toss-floridas-flimsy-voter-fraud-prosecutions> [<https://perma.cc/IX8Z-E49E>].
 9. *Jones v. Governor of Fla.*, 950 F. 3d 795 (11th Cir. 2020) [hereinafter *Jones I*] (applying heightened scrutiny and affirming preliminary injunction against SB 7066 entered by the district court).
 10. *Jones*, 462 F. Supp. 3d at 1205 (N.D. Fla. 2020).
 11. *Jones II*, 975 F.3d at 1049 (en banc). While *Jones II* was a 6-4 decision in favor of upholding SB 7066, it is worth noting that a total of 8 federal judges concluded that heightened scrutiny applied, and that SB 7066 was unconstitutional. The judge count finding SB 7066 unconstitutional included the district court judge, three judges on the *Jones I* panel, and the four dissenters in *Jones II* en banc. In this case it was only six active judges of the Eleventh Circuit that disagreed with the *Jones I* panel. However, that was sufficient to overturn *Jones I* and reverse the District Courts ruling on the merits because the Eleventh Circuit's rules appear to only permit the senior judges who issued *Jones I* to be part of the en banc court if it was reviewing *Jones I* directly. *See* Fed. R. App. P. 35 11th Cir. R. 35-9. Under the rules, they would have been permitted to participate if, for example, the en banc court was in the procedural posture of rehearing *Jones I*. However, the Eleventh Circuit rejected the State's request for an en banc rehearing of *Jones I* and instead waited just a few months till the trial on the merits was over to take the case en banc in *Jones II*. This procedural difference allowed the Eleventh Circuit majority to practically rehear *Jones I* and overturn it without having

The *Jones II* court ruled in favor of the State, finding SB 7066 constitutional. However, it did not do so without outlining certain protections for voters even under SB 7066. The *Jones II* court reasoned that good faith voters would not be prosecuted for mistakenly registering and that once placed on the rolls post-registration those voters would be entitled to vote until the state screened and removed them through the proper removal process.¹² During oral arguments, the State assured the *Jones II* court that it had “gotten its act together” and explained that post-registration the burden is on the State to find credible and reliable evidence of ineligibility, and until the State does, the voter remains eligible to vote.¹³ It explained that the State was applying the rule of lenity on eligibility determinations by erring in favor of voter eligibility until the State identifies credible and reliable information to the contrary.¹⁴

Yet a review of the criminal investigations and prosecutions in Florida since *Jones II* indicates that the State is ignoring both its asserted policy and the court’s holding in *Jones II*. Rather, the State is scouring its records to go after those same voters it misled. Instead of reviewing records on the front end to prevent ineligible voting, the State is neglecting its self-imposed burden: it is approving registrations without screening voters, placing them on the rolls and leaving them there for years, sending them voter IDs leading them to believe they are eligible to vote, and then prosecuting them for mistakenly voting in good faith.¹⁵ Adding racial partisanship to injury, the majority of those targeted are Black voters from

to give the *Jones I* senior judges the right to sit and vote in defense of their opinion. Had the two senior judges from the *Jones I* panel been able to sit in *Jones II*, the vote would have been a split vote, 6-6 in favor of *Jones I*, thereby, leaving intact both the *Jones I* heightened-scrutiny precedent and the District Court’s ruling on the merits rendering SB 7066 unconstitutional pursuant to *Jones I*. See Fed. R. App. P. 35 11th Cir. R. 35-9 (“Senior Circuit Judges’ Participation. Senior circuit judges of the Eleventh Circuit assigned to duty pursuant to statute and court rules may sit en banc reviewing decisions of panels of which they were members and may continue to participate in the decision of a case that was heard or reheard by the court en banc at a time when such judge was in regular active service.”).

12. See *infra* Part I.

13. See *infra* Part I.

14. See *infra* Part I.

15. See *infra* Part II.

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Democratic areas.¹⁶ The Governor even held press conferences to publicize the arrests and intimidate other returning citizens from voting.¹⁷ Florida's disregard of *Jones II* in this way is proving the *Jones II* dissenters were correct when they warned the majority that SB 7066 is administratively irrational and would lead to these problems.¹⁸ They prophetically warned that the State could not be trusted to provide good faith protections against prosecutions of mistaken voters, a failure that would in turn deter eligible but uncertain voters from registering and voting.¹⁹

To properly fix Florida's self-created broken system, the Legislature must fund the creation of a centralized voter information system that reliably and diligently gives election officials and returning citizens assurances of their eligibility and, in the case that they are ineligible, informs them of what they must do to become eligible. Such a system must be created with safeguards that err on the side of the voter, that allow returning citizens to challenge incorrect state records (like in my situation), and that provides legal protection for voters who rely on such system.²⁰ In the interim, the governor must use his executive powers to

16. *See infra* Part II.

17. 10 REASONS, *supra* note 8.

18. *Jones II*, 975 F.3d at 1086-1090 (Jordan, J., dissenting).

19. *Id.* at 1064, 1072-1073, 1086-1090; 1092-93, 1112; *see also Florida's Voter Fraud Arrests Are Scaring Away Formerly Incarcerated Voters*, <https://www.themarshallproject.org/2022/11/04/florida-s-voter-fraud-arrests-are-scaring-away-formerly-incarcerated-voters> [].

20. *See* Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519 (2020) (coining the term "second chance gap" as the difference between eligibility and delivery of a person's second chance, such as voting rights restoration, caused often by administrative failures such as lack of awareness, complicated criteria, informational deficiencies, inconsistent application of the rules, calculation mistakes, and financial barriers. Clear criteria, delivery-informed legislation and automation are all ways to close the gap.); *see also About Paper Prisons*, PAPER PRISON INITIATIVE OF SANTA CLARA UNIV., <https://paperprisons.org/about.html> [<https://perma.cc/N8EQ-DVGU>] ("The Paper Prisons Initiative of Santa Clara University conducts empirical research to draw attention to the tens of millions of Americans burdened by contact with the criminal justice system despite being eligible for relief from this contact. We document the 'second chance gap' between eligibility for and delivery of relief from the criminal justice system as provided by, e.g., reinfranchisement, resentencing, or records expungement, using the

order—under penalties of removal—local and statewide law prosecutors to follow *Jones II* and the State’s rule of lenity policy and stop criminally arresting and prosecuting good faith mistaken voters under SB 7066. Florida’s Nobel Peace Prize-nominated voting rights organization, the Florida Rights Restoration Coalition (FRRRC)—which itself is led by returning citizens—is demanding the same fixes on the ground as it leads efforts in assisting fellow returning citizens impacted by Florida’s broken system.²¹

In this essay, I discuss the rationales and assurances provided in *Jones II*, show how Florida is disregarding them, and provide policy recommendations for Florida to course correct. Part I provides the history of disenfranchisement in Florida, Amendment 4, SB 7066, and the *Jones I* and *II* litigation. It helps contextualize how the State’s actions in passing SB 7066 resulted in the broken restoration system we have today. It also records the important representations the State made to the *Jones II* court during oral arguments. These representations by the State are in essence publicly asserted state policies on SB 7066. They are favorable for returning citizens, but do not appear to have been transcribed and widely circulated so the excerpts are compiled here to make them easily accessible to the public. Part II shows how the State has acted in bad faith in criminalizing mistaken good faith voters contrary to *Jones II* and the State’s asserted rule of lenity policies discussed in Part I. Part III provides the steps the State must take to course correct, including the creation of a centralized voter information system with proper safeguards to eliminate confusion among returning citizen voters and election officials. The State must immediately stop arresting and prosecuting good faith voters who mistakenly voted due to the State’s broken system. Several recommendations are provided in this section to achieve these objectives in the most democratic way possible.

methodology described in America’s Paper Prisons: The Second Chance Gap (Mich. Law. Rev. 2020”).

21. See FRRRC Bail, Legal Defense Fund, and Petition to assist prosecuted returning citizens, <https://floridarrc.com/>; see also *Voting With a Criminal Record in Florida: What You Need to Know*, NAACP LEGAL DEF. FUND (Aug. 2022), www.naacpldf.org/wp-content/uploads/FL-A4-Resource.pdf [<https://perma.cc/Y8MP-NWC6>]; 10 REASONS, *supra* note 8.

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PART I—DISENFRANCHISEMENT AND RE-ENFRANCHISEMENT'S ROOTS AND
FLORIDA'S RESPONSE

History of Disenfranchisement in the US and Florida

The practice of targeted disenfranchisement in the US is historically rooted in two popular waves in which the practice expanded and went from dormant to active: an early to mid-nineteenth century pre-Civil War wave and a post-Civil War wave.²² The pre-civil war wave was a reactionary response to keep so-called “undesirables” from the ballot as property requirements to vote were being eliminated.²³ This first wave was primarily class-based and went alongside the expansion of state-wide criminal legal systems.²⁴ It was not racially motivated because Black people were already disenfranchised by other means, particularly through slavery in the South and property requirements in the North.²⁵ The US experienced its second major expansion of felony disenfranchisement after the Civil War in reaction to the newly enfranchised freed Black male adults.²⁶ Florida enacted its first felony disenfranchisement policy in its constitution and laws during the first wave in 1838 and 1845 respectively,²⁷ but it expanded its reach during the reactionary post-civil war period. This post-civil war expansion was racially motivated even though the laws remained racially neutral on their face in order to pacify the federal constitution's requirements. The Mississippi Supreme Court unabashedly explained this racially motivated discriminatory scheme stating that their disenfranchisement practice was constitutional because Mississippi “[r]estrained by the federal constitution from discriminating against the negro race [directly] . . . discriminated against its characteristics and the offenses of which its weaker members were

22. JEFF MANZA & CHRISOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 53-55 (Oxford University Press 2006).

23. MANZA & UGGEN, *supra* note 22, at 53–55.

24. *Id.*

25. *Id.*; see also Angel E. Sanchez, *What Impact is Felony Disenfranchisement Having on Hispanics in Florida?*, 8–10 (2017) (Honors undergraduate thesis), <https://ucf.digital.flvc.org/islandora/object/ucf%3A46035> [<https://perma.cc/JFB6-JJV4>].

26. MANZA & UGGEN, *supra* note 22, at 53–55; see also Sanchez, *supra* note 25, at 8–10.

27. *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1205 (N.D. Fla. 2020).

prone.”²⁸ Even as late as 1901, Alabama proudly recorded its disenfranchisement laws as “within the limits imposed by the Federal Constitution, to establish *white supremacy* in this State.”²⁹ Florida joined this second racially motivated wave of disenfranchisement by expanding it from crimes of fraud and trust³⁰ to “any person convicted of [a] felony” for life “unless restored to civil rights.”³¹ Therefore, while Florida practiced disenfranchisement as far back as 1838, it joined the racially motivated wave of disenfranchisement laws after the Civil War. In 1974, the US Supreme Court affirmed the practice of facially neutral felony disenfranchisement laws in *Richardson*.³² The Court ruled that state disenfranchisement laws were constitutional by reading the apportionment provision in Section 2 of the Fourteenth Amendment as giving States an affirmative sanction to disenfranchise its citizens for a crime. While *Richardson* remains the controlling authority on this question, it is worth noting that it was poorly decided because among other things it relied on a constitutional provision that is no longer operative.³³ In 2010, Justice O’Connor criticized *Richardson* saying, “it is not obvious” how the Section 2 apportionment provision leads to this result.³⁴ At any rate, *Richardson* is still the law of the land on state disenfranchisement. Here, however, the issue is re-enfranchisement and the State’s obligation, when it chooses to re-enfranchise, to do so in ways that comport with the US Constitution—*Richardson* tells us nothing about this.³⁵

28. *Ratliff v. Beale*, 74 Miss. 247 (1896).

29. *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (emphasis added).

30. KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES 35 (LFB Scholarly Publishing 2005).

31. FLA. CONST. art. XIV, §§ 2, 4 (1868).

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

33. See e.g., John B. Schrader, *Reawakening “Privileges or Immunities”*: An Originalist Blueprint for Invalidating State Felon Disenfranchisement Laws, 62 VANDERBILT L. REV. 1285 (2009).

34. *Harvey v. Brewer*, 605 F.3d 1067, 1072 (9th Cir. 2010).

35. *Jones II*, 975 F.3d 1016, 1059 (11th Cir. 2020) (Martyn, J., dissenting) (“This is the holding of *Richardson v. Ramirez*, 418 U.S. 24, 94 S. Ct. 2655, 41 L.Ed.2d 551 (1974), in which the Supreme Court held that the Fourteenth Amendment condones felon disenfranchisement. *Id.* at 54–56, 94 S. Ct. at 2671–72. But *Richardson* does not tell us what a State may do once the State

Citizen Approved "Amendment 4" (2018)

In 2018, Florida voters approved the citizen-initiated Voter Restoration Amendment, known as Amendment 4, which amended the State's constitution and rolled back the State's Jim-Crow era practice of categorical life disenfranchisement for felony convictions.³⁶ Perhaps the most remarkable fact about this historical act of democratic expansion is that it was led by the very people felony disenfranchisement intended to silence. That is, people with felony convictions in Florida led a decades-long movement to put people over politics and restore second chances through their citizen-initiated Amendment 4 petition—a petition that they themselves were not even allowed to sign or vote for. In a Southern state governed largely by conservatives for more than a quarter century, it was not progressive politicians or unimpacted experts that achieved this monumental feat; rather, it was the directly impacted people closest to the problem who did.³⁷

Under Amendment 4, a person in Florida convicted of a past felony conviction—except for murder or felony sexual offense—have their right to vote automatically restored upon *completion of all terms of sentence, including parole and probation*.³⁸ During the 2018 general election, voters approved Amendment 4 with a resounding majority: more than sixty-four percent of people voted in favor of it, and the Amendment went into effect on January 8, 2019.³⁹ On its face—and in practice—Amendment 4 was self-

Legislature—or, in this case, the people—adopts a scheme to restore the fundamental right to vote to its ex-felons.”).

36. See Jon Schuppe, *Voters Kill Remnants of Jim Crow in Florida and Louisiana*, NBC (Nov. 7, 2018, 3:37 PM), <https://www.nbcnews.com/news/us-news/voters-kill-remnants-jim-crow-florida-louisiana-n933441> [<https://perma.cc/TPS7-FZBV>].
37. See DESMOND MEADE, LET MY PEOPLE VOTE 57-62, 65 (2020); see also Michael Morse, *The Future of Felon Disenfranchisement Reform: Evidence from the Campaign to Restore Voting Rights in Florida* 109 CAL. L. REV. 1143, 1150, 1153 (2021).
38. See FLA. CONST. art. VI, § 4; see *In re* Voting Restoration Amendment, 215 So. 3d 1202, 1208 (Fla. 2017) (stating that “the chief purpose of the amendment is to automatically restore voting rights to felony offenders, except those convicted of murder or felony sexual offenses, upon completion of all terms of their sentence”).
39. See *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1205 (N.D. Fla. 2020).

executing and did not require implementing legislation to go into effect.⁴⁰ Indeed, on the day Amendment 4 went into effect, individuals like me began registering throughout the State. Our registrations were accepted by the supervisors of elections, and we were registered to vote and sent voter IDs.⁴¹

*SB 7066 (2019)*⁴²

During the 2019 legislative session, however, Florida lawmakers began debating issues related to Amendment 4 and started “aiming at a bill . . . that had a maximal disenfranchisement result.”⁴³ Lawmakers claimed to be “faithful steward[s]” seeking only to implement the purpose and intent of Amendment 4, but they quickly abandoned that role when the competing House and Senate bills began adding varying LFO restrictions outside of the plain language of Amendment 4.⁴⁴ The Senate version, for example, deemed LFOs completed when they were converted to civil liens, while the prevailing House version did not.⁴⁵ One of the bill’s sponsor openly admitted that Florida did not have the centralized system needed for the State to perform its screening tasks and repeatedly stated that SB 7066 would take eleven databases to determine whether a returning citizen had fulfilled all its LFOs. They knew that the more LFOs they piled into SB 7066 the harder it would be for election officials to determine eligibility. Despite this awareness, these lawmakers purposefully did not mandate a centralized database making it likely that election officials could never complete the screening tasks of SB 7066.⁴⁶

40. *See id.* at 1206; *see also* Angel Sanchez & Anneke Dunbar-Gronke, *Florida Law Makers Threaten the Restoration of Voting Rights: Is it Constitutional?*, U. MIAMI L. REV. (2019), <https://lawreview.law.miami.edu/florida-law-makers-threaten-restoration-voting-rights-constitutional> [https://perma.cc/8J8S-BC8Y].

41. *See* Sanchez & Dunbar-Gronke, *supra* note 40.

42. FLA. STAT. § 98.0751(2)(a) (2023) (referring to the section amended by SB 7066).

43. *Jones II*, 975 F.3d 1016, 1108 (11th Cir. 2020) (citing an expert report).

44. *See id.*; *Jones*, 462 F.Supp.3d at 1213, 1235-37.

45. *See Jones*, 462 F.Supp.3d at 1213, 1235-36.

46. *See id.*; *Jones II*, 975 F.3d at 1108, 1110-11 (citing expert report).

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Also, SB 7066 did not fund the additional twenty-one employees that its fiscal analysis stated would be needed for the Division of Elections to properly screen and implement this law.⁴⁷ Unsurprisingly, election officials responsible for screening voter eligibility under SB 7066 saw their workload increase by huge orders of magnitude, such that the State would not complete its screening of the 2019–2020 returning citizen registrants until 2026 at the earliest.⁴⁸ The impossibility of the task becomes evident when one considers the compounding effect additional years have.

The Legislature ultimately passed SB 7066 creating an unfunded, immensely confusing, and impossible to administer LFO scheme restricting Amendment 4 restoration. The LFO scheme in SB 7066 (codified into law as F.S. § 98.0751) defines Amendment 4's "completion of all terms of sentence" to mean not only completion of any term of incarceration and supervision but also completion of all court costs, fees, fines, and restitution (LFOs) "contained [with]in the four corners of the sentencing document" even after they are converted to civil liens, but excludes amounts "that accrue after the date the obligation is ordered as a part of the sentence."⁴⁹ Moreover, because SB 7066 did not create a statute of limitation after which LFOs are deemed completed, state officials have been researching sentencing documents and proof of payments for incredibly old convictions, going as far back as to "a 50-year-old conviction for which records could not be found."⁵⁰ In effect, SB 7066 mandated an LFO scheme in which LFOs are sometimes difficult or impossible to

47. *See Jones*, 462 F. Supp. 3d at 1228–29.

48. *See id.*

49. FLA. STAT. § 98.0751 (2023); *see also* FLA. STAT. § 98.0751(2)(a)5.c. The Florida Supreme Court later issued an advisory opinion affirming Amendment 4's "all terms of sentence" language encompassed legal financial obligations. But, on request of the Governor, the court limited its opinion and did not answer what constituted "completion" of those LFOs, thereby leaving the Florida Legislature with vast discretion on defining what constitutes "completion" for the purposes of voting under Amendment 4. This is important because it means the Legislature has the power and opportunity to apply the lessons it has learned since the passage of SB 7066 and apply fixes that would resolve many of the problems and confusions undermining confidence in the electoral process in Florida. *See generally* Opinion to the Governor re: Implementation of Amendment 4, the Voting Restoration Amendment, 288 So.3d 1070 (Fla. 2020) [hereinafter Amend. 4 Adv. Op.]..

50. *Id.* at 1221.

research and calculate, especially without a centralized data system that tracks LFOs and their payments. SB 7066 restrictions also include Amendment 4's disqualifying felony convictions of murder and felony sexual offense. In sum, people with past felony convictions who complete their incarceration and supervision may be ineligible for Amendment 4 restoration due to a disqualifying offense (i.e., a conviction of murder or felony sexual offense) or unpaid LFOs. Because this essay mainly focuses on the problems created by SB 7066's LFO requirement, not the disqualifying offenses, references to returning citizen voters moving forward concern those that do not have disqualifying offenses unless otherwise specified. It should be noted, however, that time and resources election officials must spend trying to screen for LFOs is time taken away from them to properly screen for disqualifying offenses. Thus, an inability to properly implement and administer SB 7066's LFO system can result in a broken system which not only hurts people with LFOs as we shall see later in Part II.

Jones I and Jones II

In 2019, immediately after SB 7066 went into effect, a federal lawsuit seeking injunction was filed in the Northern District of Florida claiming that SB 7066's LFO scheme violated the US Constitution.⁵¹ During the federal litigation, the Florida Supreme Court issued an advisory opinion responding to a request from the Governor in which it affirmed that Amendment 4's "all terms of sentence" language includes court costs, fees, fines, and restitution.⁵² However, the Florida Supreme Court limited its opinion and chose to not answer what constitutes "*completion*" of LFOs, leaving the Florida Legislature—and federal courts, if necessary—with room to define when LFOs are deemed *completed* for the purposes of voting under Amendment 4.⁵³ For example, law makers can deem LFOs complete once they are converted to civil liens. This is discussed in Part III. The federal lawsuit asserted, among other claims, that (1) the LFO scheme creates wealth-based discrimination by punishing individuals by denying re-enfranchisement to those who are unable to pay solely on account of wealth, (2) the LFO scheme imposes a tax on voting by

51. *See Jones II*, 975 F.3d at 1025.

52. *See* Amend. 4 Adv. Op.

53. *Jones*, 462 F. Supp. 3d at 1208 (citing Amend. 4 Adv. Op., 288 So.3d 1070).

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requiring payment of court cost and fees, which are akin to a tax, to vote, (3) the LFO scheme is void for vagueness because many voters, just like election officials, are unable to know with certainty whether they have outstanding LFOs, forcing them to guess and risk prosecution if mistaken, and (4) the State has failed to provide procedural due process by not outlining and implementing constitutionally adequate procedures for determining eligibility under the LFO scheme to discourage arbitrary and discriminatory enforcement.⁵⁴

Later in 2019, the District Court entered a preliminary injunction on the wealth-based discrimination claim and the Eleventh Circuit, in *Jones I*, unanimously affirmed the preliminary injunction. The Court of Appeals issued an opinion holding that SB 7066's LFO scheme was unconstitutional under the applicable heightened scrutiny analysis.⁵⁵ The Court went further and stated that SB 7066's LFO scheme would also fail a rational basis test if at trial it is established that the LFO scheme—as applied to people who are genuinely unable to pay—turns out to be denying most of the people that Amendment 4 was intended to benefit.⁵⁶ Later, on April 7, 2020, the District Court certified a class for all persons who would be otherwise eligible to vote except for unpaid LFOs, and a subclass for those within the class who are genuinely unable to pay the LFO.⁵⁷

On May 24, 2020, after an eight-day trial on the merits, the District Court made several factual findings. The District Court, following *Jones I* precedent, ruled that Amendment 4's LFO as enforced under SB 7066's LFO scheme violated the Equal Protection Clause when applied to individuals who are genuinely unable to pay under both heightened scrutiny and rational basis analysis.⁵⁸ It also ruled that, regardless of ability to pay, court costs and fees amounted to a government tax on the right to vote in violation of the Twenty-Fourth Amendment.⁵⁹ The District Court concluded that the Due Process claims carried considerable force but did not need to be reached because the remedy to the other claims

54. *See generally Jones*, 462 F.Supp.3d 1196.

55. *See Jones I*, 950 F.3d 795, 800 (11th Cir. 2020).

56. *See id.* at 809, 817; see also *Jones*, 462 F. Supp. 3d at 1219.

57. *See Jones v. Desantis*, No. 4:19CV300-RH/MJF, 2020 WL 5646124 (N.D. Fla. Apr. 7, 2020) (certifying classes).

58. *See Jones*, 462 F. Supp. 3d at 1218-19.

59. *See id.* at 1234.

would resolve the Due Process issues.⁶⁰ The Court of Appeals later ruled that the Due Process claims were not decided, which means the claims might not be prejudiced and precluded from refiling now, especially considering SB 7066's vagueness issues resulting in prosecutions.⁶¹

The District Court entered a permanent injunction and issued an order consistent with its ruling allowing returning citizens—except those convicted of murder or felony sexual offenses—to register and vote if (a) they only had outstanding court costs and fees, or (b) they had fines or restitution but were genuinely unable to pay. The District Court's injunction was in place and binding in Florida between May 24, 2020, and July 1, 2020. Therefore, returning citizens relying on the injunction would not be subject to arrests and prosecutions for registering or voting during this period. The State appealed the District Court's ruling on the merits and requested a stay on the injunction. The Eleventh Circuit Court of Appeals heard the appeal en banc in *Jones II* and stayed the District Court's injunction on July 1, 2020. The returning citizens sought relief from the US Supreme Court to overturn the stay of the injunction before the 2020 elections. The Supreme Court denied the request to remove the stay and Justice Sotomayor issued a dissent.⁶²

*Florida's Asserted "Post-Registration" Process and "Rule of Lenity"
Policy During the Jones II Oral Argument Colloquy:*

On August 18, 2020, the *Jones II* court heard oral arguments.⁶³ During oral arguments, Judge Jordan asked the State about the irrationality of SB 7066's implementation process, noting that during the entire time the trial was pending, the State had reviewed zero of the 85,000 flagged voters—and even zero of the seventeen plaintiffs in the case. In response, the State admitted that “Florida did not get its act together as quickly as one would hope to be sure,” but stated that it was there to tell the court “that Florida

60. *See id.* at 1242.

61. *See Jones II*, at 1027; *see also Jones I*, 950 F.3d at 807 n.8. (Noting that “the due process claim turns on factual questions about how Florida’s LFO collection scheme operates in practice, and in the absence of any factual findings by the district court, we will not attempt to find such facts on this preliminary record.”)

62. *See Raysor v. DeSantis*, 140 S. Ct. 2600, 2600 (2020).

63. *See Oral Argument, Jones II*, 975 F.3d 1016 (11th Cir. 2020) (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= [<https://perma.cc/HZ2Q-W4ZK>].

has gotten its act together.”⁶⁴ The State unveiled its process and rule of lenity policy in its colloquy with several judges.

Despite its lack of action to date, the State explained to the court that it had established a process providing two ways in which voters could determine their eligibility status: (1) by asking the Division of Elections for an advisory opinion as to their eligibility, or (2) through the post-registration screening which the State is tasked with conducting after a person registers.⁶⁵ Importantly, the State emphasized its “rule of lenity” policy when determining eligibility, highlighting that when in doubt, the State will resolve the doubt in favor of the voter.⁶⁶ That is, to the extent there is no credible and reliable information of ineligibility, the voter will be deemed eligible. The State further explained how its new process would work. It stated that people who are unsure about their eligibility could

64. Judge Jordan stated, “Mister Cooper if I could interrupt you for a moment please we’ve got limited time. What does it say that Florida was not even able to process the applications of the seventeen plaintiffs in this case during the entire time that the trial was pending. Florida couldn’t even process seventeen applications even using what you say is the advisory application process, the advisory opinion process, what does that tell you about the rationality of Florida system.”

Mr. Cooper, for the State, responded, “Your honor it tells me that Florida did not get its act together as quickly as one would hope, to be sure-- but I am here to tell you that Florida has now gotten its act together—it has its advisory opinion process in place— . . . it is only received your honor some of thirty five or so request for an advisory opinion— it is responded to them quickly and promptly . . . and most importantly when there is doubt about whether or not the individual felon has satisfied their legal financial obligations, it is resolved that doubt in favor of eligibility.” *Id.* at 00:24:24.

65. The State explained, “[I]t is very important for the court to understand that in [making determinations about what someone owes] [the State] has taken steps both before eligibility, before the registration and after the registration—before the registration it has the [Division of Elections’] advisory opinion process your honor.” *Id.* at 00:17:18.

66. The State further assured the Court, in response to Judge Martin’s question, that as to “[t]hose who think they might have paid all their fines but they’re not sure. Two things. First, they can register and vote if they in good faith think they’ve paid and then the process which clearly even Judge Hinkle said the process for the state to discern a registration application and whether the person is eligible includes: notice, a hearing, an ability to contest.” *Id.* at 01:52:04.

either request an advisory opinion *or* “register in good faith” if they believed they satisfied their LFOs.⁶⁷ Offering a post-registration eligibility determination makes complete sense, because an advisory opinion request can take weeks or months and would be impractical, for example, for registrants at voter drives right before the State’s registration deadline. This is also consistent with the Division of Election’s interpretation of Florida election law in which it has said that “restoration upon completion of all terms of a sentence is automatic and *you need not wait for receipt of this written opinion in order to vote.*”⁶⁸ The State further clarified that after a registrant submits a voter registration, the burden shifts to the State to conduct its mandated investigation to find credible and reliable information of ineligibility. It also stated that if such ineligibility information is found, the State has the duty to give the registrant notice and a right to a hearing to contest that proposed ineligibility determination.⁶⁹

Jones II Majority: Assuring Non-Prosecution of Mistaken Good-Faith Voters and Entitlement to Vote While on the Voter Rolls

On September 11, 2020—right before the 2020 general elections—the Eleventh Circuit issued its opinion in *Jones II*, in which a 6-4 majority overturned its prior precedent. The court ruled that the *Jones I* precedent requiring heightened scrutiny was wrong and also held that Florida’s LFO

67. *Id.*

68. See Letter from Fla. Div. of Elections on Response to Request for Advisory Opinion F-20-9, *supra* note 5 (“As an attorney with the Office of General Counsel discussed with you on the phone on August 14, 2020, *restoration upon completion of all terms of a sentence is automatic and you need not wait for receipt of this written opinion in order to vote.*”) (emphasis added).

69. The State explained, “[T]hey also will know it if they believe in good faith they have paid it and they register to vote—and then the process to determine whether or not the new registrant is eligible will kick in and the state will investigate the facts concerning eligibility in that post registration process, which is clearly one that complies with due process.” Oral Argument at 01:55:32, *Jones II*, 975 F.3d 1016 (11th Cir. 2020) (No. 20-12003), https://www.ca11.uscourts.gov/oral-argument-recordings?title=20-12003&field_or_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D= [https://perma.cc/HZ2Q-W4ZK].

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scheme did not violate the U.S. Constitution.⁷⁰ The *Jones II* majority dismissed the dissenters' concerns, reasoning that SB 7066 was not unconstitutionally irrational to administer because (a) good-faith registrants who later turned out to be mistaken would not be prosecuted (i.e., good-faith protection against prosecution) and (b) once the State places a person on the voter rolls, they are presumed eligible and entitled to vote for as long as they remain on the rolls unscreened by the State (i.e., a presumption of voting eligibility while on the rolls until the state proves otherwise). This presumption of eligibility and entitlement to vote remains until the State rebuts that presumption. The Court's description of how SB 7066 is supposed to work within Florida's election-law process tracked with the State's asserted policy and process during oral arguments, as well as the State's earlier assurances made throughout the litigation downplaying the possibility of prosecutions against mistaken good faith voters.⁷¹

The *Jones II* court, in line with the State's assertions,⁷² further reasoned that Florida's scienter requirement for crimes of ineligibly registering and voting would limit prosecutorial discretion in favor of registrants and voters who later prove to have been mistaken about their eligibility.⁷³ The Court went so far as to explicitly say that "no person with a past conviction 'who honestly believes he has completed the terms of his sentence commits a crime by registering and voting.'"⁷⁴

70. *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla. 2020).

71. *Id.* at 1093.

72. 10 REASONS, *supra* note 8; En Banc Opening Brief of Defendants-Appellants at 68, 74-75, *Jones II*, 975 F.3d 1016 (No. 20-12003).

73. *Jones*, 975 F.3d at 1047.

74. *Id.* ("The challenged laws are not vague. Felons and law enforcement can discern from the relevant statutes exactly what conduct is prohibited: a felon may not vote or register to vote if he knows that he has failed to complete all terms of his criminal sentence. This clear standard, which includes a scienter requirement, provides fair notice to prospective voters and 'limit[s] prosecutorial discretion.'"); *id.* at 1047-48 (holding that no person with a past conviction "who honestly believes he has completed the terms of his sentence commits a crime by registering and voting").

With regards to those people placed on the voter rolls by the State and left there without screening, the *Jones II* court explicitly stated they were eligible to vote until the State proved otherwise. It explained that until the State “meets its self-imposed burden of gathering the [credible and reliable] information necessary to prove [a registrant’s] ineligibility[,]”⁷⁵ those who have registered in good faith and placed on the voter rolls are eligible voters “entitled to vote.”⁷⁶ Put another way, once placed on the voter rolls, that person is presumed an eligible voter and is “entitled to vote” until the State—which has the self-imposed burden of screening out ineligible voters—identifies credible and reliable information of ineligibility and properly removes the person from the voter rolls.⁷⁷ *Jones II*’s reasoning is consistent with the State Division of Elections’ legal interpretation of

75. *Id.* at 1036.

76. *Id.* at 1026 (“Florida has yet to complete its screening of any of the registrations. Until it does, it will not have credible and reliable information supporting anyone’s removal from the voter rolls, and all 85,000 felons will be entitled to vote.”); *id.* at 1035-36 (“The dissenters’ contention that state officials’ implementation of Amendment 4 has prevented any felons from benefitting from the amendment is false. Eighty-five thousand felons are now registered voters, and each one will remain so unless Florida meets its self-imposed burden of gathering the information necessary to prove his ineligibility. Our dissenting colleagues quibble with our assertion that all of these registered voters are ‘entitled to vote,’ but they point to no evidence that any of the 85,000 voters will be unable to cast a ballot in an upcoming election.”)

77. Note that *Jones II* relies on this understanding of the Florida voter process to conclude that that SB 7066’s means are not irrational. That being said, the *Jones II* conclusion about the voter process, if accurate—which it needs to be for the law’s means to be rational—separately undermines and contradicts the State’s asserted legitimate interest in the SB 7066’s LFO requirement which is to ensure that only people with past felony convictions who complete of all terms of sentence, including LFOs, can vote. Thus, SB 7066 is either irrational (a) because it creates an LFO condition without providing a means for readily and reliably informing individuals and election officials of the status of their LFOs, or (b) because it assumes a process in which people—including those who may have outstanding LFOs—are presumed eligible to vote once they are registered thereby entitling some people who may not have completed their LFOs with the right to vote. *Id.* at 1087. Whatever can be said about SB 7066’s irrationality, however, the *Jones II*’s rationality holding—reasoned on Florida’s presumption of eligibility to vote while on the voters—controls.

Florida election law which has stated that “absent credible and reliable information to the contrary,” a person is entitled to vote.⁷⁸

To illustrate the “presumption of eligibility” that attaches once a voter is placed on the voter rolls, the *Jones II* court used the 85,000 returning citizens who were registered and placed on the voter rolls in the first 18 months after the passage of Amendment 4. The State had flagged them for screening but had screened 0 of the 85,000.⁷⁹ The court stated, “Florida has yet to complete its screening of any of the registrations and, until it does, it will not have credible and reliable information of ineligibility so all 85,000 felons will be entitled to vote.”⁸⁰ It is worth noting that the court used all 85,000 returning citizens who had registered in the first 18 months to illustrate the broad applicability of this presumption, because many of them likely had LFOs and disqualifying offenses. Dismissing the

78. Letter from Fla. Div. of Elections on Response to Request for Advisory Opinion F-20-9 (Aug. 17, 2020) (concluding that “based upon the resources available to the Division and based upon your statements [that you paid it] (with such satisfaction also affirmed by your attorney in a Motion to Modify Probation), and *seeing no credible and reliable evidence to the contrary*, the Division finds that your voting rights have been restored by operation of law by virtue of you having paid an amount exceeding the amounts ordered in your felony sentences,” despite the Clerk’s record showing outstanding LFOs) (emphasis added), <https://files.floridados.gov/media/703434/f-20-9-redacted-final-response-to-ao.pdf> [<https://perma.cc/L6X5-QTW7>]; *see also* Letter from Fla. Div. of Elections on Response to Request for Advisory Opinion F-20-6 (Aug. 17, 2020) (“[That case] not only includes a felony conviction, but also a misdemeanor conviction. There is no delineation in the Order Assessing Additional Charges, Costs, and Fines and Entering Judgment between those fees, fines, and costs assessed for the felony conviction and those assessed for the misdemeanor conviction. Because restoration of voting rights is only incumbent upon satisfying the terms of a felony sentence or sentences (not of a misdemeanor sentence), and *having no credible and reliable evidence as to which fees, fines, and costs were specifically allocated or attributable to the felony conviction, the Division errs in favor of you, the voter, and finds that no amount in [that case] is required to be paid for purposes of restoring voting rights.*”) (emphasis added), <https://files.floridados.gov/media/703431/f-20-6-redacted-final-response-to-ao.pdf> [<https://perma.cc/VE44-44UJ>].

79. *Jones*, 975 F.3d at 1026.

80. *Id.* at 1026.

dissenters' concern, the court affirmed this presumption of eligibility, stating:

Eighty-five thousand [people with past felony convictions] are now registered voters, and each one will remain so unless Florida meets its self-imposed burden of gathering the information necessary to prove his ineligibility. Our dissenting colleagues quibble with our assertion that all these registered voters are entitled to vote, but they point to no evidence that any of the 85,000 voters will be unable to cast a ballot in an upcoming election.⁸¹

The State did not seek a rehearing or clarification of the *Jones II* opinion to express any disapproval or concern with the court's reasoning and assurances. To the contrary, the court's articulation tracked with the State's asserted policy during oral arguments.

To summarize, under both the State's expressed policy during oral arguments and the *Jones II* court's opinion, mistaken good-faith registrants are protected from prosecution. Once the State receives a voter's registration, the burden shifts to the State to determine their eligibility. Once the State processes the person's registration and places the person on the voter rolls, the person is presumed an eligible voter who is entitled to vote. This remains the case until the State meets its burden of proving ineligibility by identifying credible and reliable information through the State's voter-removal process, which gives the voter a right to notice and a hearing.⁸² Lastly, the *Jones II* court's understanding and explanation is not merely a persuasive federal-court interpretation of Florida law, but a binding one because the court relied on that interpretation in its rational-basis analysis under the U.S. Constitution to conclude that it was not an administratively irrational law.⁸³ Florida may be the ultimate authority on its own State election laws and policies, but *Jones II*'s rational-basis analysis depended on the court's interpretation of those laws. If the court's understanding of Florida law, which it relied on in its rational basis analysis proves to be wrong because the State chooses to disregard it or interpret it differently, then SB 7066 might indeed not be constitutional as

81. *Id.* at 1036.

82. *Id.* at 1026.

83. *Id.* at 1108.

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the *Jones II* court assumed and, thereby, open the door to new constitutional claims given the new facts.⁸⁴

PART II – BAD-FAITH PROSECUTIONS

With Part I in mind, the essay now turns to the State's actions to show that Florida is not honoring the *Jones II* assurances or its asserted policy. Judge Jordan exclaimed in his *Jones II* dissent that "Florida's lack of good faith in the 18 months since the passage of Amendment 4 [was] undeniable and palpable."⁸⁵ Yet, in the 18 months after *Jones II*, it only got worse.

Despite the fact that the State had downplayed the possibility that the 85,000 returning citizens it identified during litigation who acted in good faith would be prosecuted, the Florida Department of Law Enforcement (FDLE) soon after began investigating returning citizens in 2021.⁸⁶ Then, as the 2022 midterm elections neared, news started to emerge of returning citizens being charged and prosecuted for incorrectly believing they were eligible to register and vote under SB 7066.⁸⁷ A local prosecutor in Alachua County was the first to begin prosecuting those being investigated by the FDLE.⁸⁸

84. *Id.*

85. *Id.*

86. Tracey Rousseau, *Investigative Summary*, FLA. DEP'T OF L. ENFORCEMENT 4 (2021) [hereinafter FDLE Report], <https://perma.cc/6B2Q-5GTR> ("On June 1, 2021, The Florida Department of Law Enforcement received a complaint from the 8th Judicial Circuit State Attorney's Office (SAO) which contained information from an Alachua County citizen, Mark Glaeser, who alleged several ineligible felons voted illegally in the 2020 General Election. Furthermore, Glaeser alleged the Alachua County Supervisor of Elections (ACSOE), Kim Barton or her designee, facilitated such illegal voter registrations by visiting the Alachua County Jail on July 15, 2020 and registering numerous convicted felons who were incarcerated at the time. Special Agent Tracey Rousseau was assigned the case to investigate the allegations.")

87. Gary Fineout, *Voter Fraud Probes Underway in Several Florida Counties*, POLITICO (Mar. 22, 2022, 7:04 AM), <https://www.politico.com/newsletters/florida-playbook/2022/03/22/voter-fraud-probes-underway-in-several-florida-counties-00019113> [<https://perma.cc/YD2B-K4W6>].

88. Alexander Lugo & Carolina Ilvento, *Gainesville Man Describes as Mentally Ill is First Arrest in Florida Voter Fraud Investigation*, WUSF PUB. MEDIA (Apr. 9,

Not long after, a second wave of arrests emerged, conducted by a newly created statewide voter-police group.⁸⁹ The Office of Statewide Prosecutors (OSP) was so desperate to justify the creation of the newly created voter-police group that it violated its own statutory authority to prosecute people for crimes that had occurred in a single judicial circuit which local prosecutors did not think merited prosecutions. As a result, several of its cases were dismissed.⁹⁰ The partisan State Legislature made its support of these politically motivated prosecutions clear by immediately passing a partisan bill to amend the state law and provide OSP the power it previously did not have to bypass local prosecutors and prosecute individual voters under SB 7066.⁹¹ It is worth noting that all the voters investigated and charged in 2022 had registered and voted years earlier, back when the State had downplayed the possibility of prosecution for good-faith mistakes.⁹² Indeed, it appears that many were part of the initial 85,000 registrants flagged under SB 7066, which the *Jones II* court unequivocally stated were protected.⁹³ By the end of 2022, the total number of reported prosecutions was about thirty, but the chilling effect created by these prosecutions is certainly greater.⁹⁴ This Part details how

2022, 9:25 AM), <https://wusfnews.wusf.usf.edu/politics-issues/2022-04-09/gainesville-man-described-as-mentally-ill-is-first-arrest-in-florida-voter-fraud-investigation> [<https://perma.cc/BD4R-MAHE>].

89. *Ron DeSantis Signs Bill to Create Florida Voter-Fraud Police Force*, GUARDIAN (Apr. 25, 2022, 4:23 PM), <https://www.theguardian.com/us-news/2022/apr/25/ron-desantis-florida-governor-bill-police-voter-fraud> [<https://perma.cc/378A-83C8>].
90. Curt Anderson, *Election Fraud Case Against Florida Defendant Dismissed*, WLRN (Oct. 21, 2022, 2:10 PM), <https://www.wlrn.org/local-news/2022-10-21/election-fraud-case-against-florida-defendant-dismissed> [<https://perma.cc/SDL8-PXDW>].
91. Steve Contorno, *Florida Lawmakers Vote to Give GOP-Appointed State Prosecutor Jurisdiction over Election and Voting Matters*, CNN (Feb. 10, 2022), <https://www.cnn.com/2023/02/10/politics/election-crimes-florida-lawmakers-desantis/index.html> [<https://perma.cc/H5D4-9RXF>].
92. 10 REASONS, *supra* note 8 (“The Office of Election Crimes and Security made its first arrests this August, detaining 18 people with past convictions who allegedly voted while ineligible two years ago.”).
93. *Jones II*, 975 F.3d 1016, 1026 (11th Cir. 2020).
94. Nicole Lewis & Alexandra Arriaga, *Florida’s Voter Fraud Arrests Are Scaring Away Formerly Incarcerated Voters*, MARSHALL PROJECT (Nov. 4, 2022, 2:10

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criminal enforcement of SB 7066 is a threat to returning citizen voters and is resulting in bad-faith, unfounded criminalization of good-faith voters. It shows how the *Jones II* court's assurances are not being followed—proving they were never enough to protect voters against SB 7066's irrational and broken voter restoration system.⁹⁵

Dangers of Improper Private Citizen Complaints using SB 7066

The Alachua County prosecutions noted above stemmed from a complaint filed by a private citizen, Mark Glaeser, according to the Florida Department of Law Enforcement (FDLE) investigation report.⁹⁶ The Report states that Mr. Glaeser filed a complaint with the 8th Judicial Circuit State Attorney's Office accusing thirty-four people of illegally registering and voting in the 2020 general election based on past felony convictions.⁹⁷ Mr. Glaeser also claimed that the Alachua County Supervisor of Election (SoE) and her designee facilitated this illegal registering and voting when they visited the Alachua County Jail in July 2020 and registered numerous people with felony convictions.⁹⁸ In Florida, a person is not disqualified from voting for felony charges until the charges become actual convictions. The FDLE received the complaint from the "Alachua County Prosecutor" containing information submitted by Mr. Glaeser on June 1, 2021.⁹⁹ According to the FDLE report, 24 of the 34 people Mr. Glaeser accused of having felony convictions and illegally registering while in the jail during that period were cleared of Mr. Glaeser's accusation after the FDLE conducted its initial review.¹⁰⁰ The fact that so many people could so

PM), <https://www.themarshallproject.org/2022/11/04/florida-s-voter-fraud-arrests-are-scaring-away-formerly-incarcerated-voters> [<https://perma.cc/8S3B-Z4NV>].

95. *See Jones II*, 975 F.3d at 1047-48 (assuring that SB 7066 will be followed as the court understood it and that the scienter requirement provides fair notice to prospective voters and "limit[s] prosecutorial discretion").
96. *See supra* note 86.
97. *Id.* at 4
98. *Id.*
99. *Id.*
100. *Id.* ("SA Rousseau reviewed the list of 34 alleged felon voter names provided by Glaeser. A review was conducted of certified court documents, clemency gold seal letters, and copies of voter registration application forms for the

easily be incorrectly accused by a private citizen and that legally trained prosecutors would fail to identify this and instead forward them to be criminally investigated by a statewide law enforcement investigation is by itself terribly concerning. Only 10 individuals—from the list of 34—were identified as being in the jail with past felony convictions and registering to vote during the period in question.¹⁰¹ It is a felony for a person to willfully make false accusations regarding elections and voter eligibility matters within the jurisdiction of the Department of State¹⁰² and a misdemeanor to lack good faith or frivolously challenge another voter's ballot.¹⁰³ If accused of filing a false complaint, Mr. Glaeser and the State would argue that it was not a crime to file a good faith complaint against someone under SB 7066 that later turned out to be mistaken. Ironically, that is the same argument good faith voters are making. At any rate, the deterrent effect this will have on eligible returning citizen-voters renders SB 7066 irrational under a rational basis analysis. As the District Court noted after the trial, “In Florida, where any voter can challenge any other voter’s eligibility, *and where a mistake can lead to a prosecution*, it is hardly

identified inmates. SA Rousseau identified 10 inmates who had prior felony convictions and who registered to vote on July 15th, 16th, or 20th of 2020.”).

101. During the agents’ review of jail records, they identified three additional individuals unrelated to Mr. Glaeser’s complaint and added them to the investigation by the FDLE agent as possibly ineligibly registering and voting during the period in question. So, a total of 13 individuals were subject to this FDLE investigation.
102. FLA. STAT. § 817.155 (2022) (“Matters within jurisdiction of Department of State; false, fictitious, or fraudulent acts, statements, and representations prohibited; penalty; statute of limitations.—A person may not, in any matter within the jurisdiction of the Department of State, knowingly and willfully falsify or conceal a material fact, make any false, fictitious, or fraudulent statement or representation, or make or use any false document, knowing the same to contain any false, fictitious, or fraudulent statement or entry. A person who violates this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. The statute of limitations for prosecution of an act committed in violation of this section is 5 years from the date the act was committed.”).
103. FLA. STAT. § 101.111(2) (2022) Interestingly, the Florida Legislature has chosen not to make explicit on the voter challenge form that it is a crime for an elector or poll watcher to frivolously challenge another voter’s ballot. *See* S.B. 1794, 2020 Leg., Reg. Sess. (Fla. 2020) (enacted).

surprising that a [person with a past felony] who is newly eligible to vote but unsure of the rules would decide not to risk it.”¹⁰⁴

Dangers of Improper Law Enforcement Investigations using SB 7066

Further review of the Report reveals that the investigating FDLE agent misstated facts about SB 7066 and made several improper legal conclusions in its recommendation to criminally charge the returning citizens in question. Moreover, the FDLE agent made the SB 7066 voter-eligibility determination without any mention of consulting election officials or the election removal process.¹⁰⁵

In the Report, the agent incorrectly stated that LFOs had to be paid during all of 2020.¹⁰⁶ There was a period in 2020 (between May 24 and July 1, 2020) when most LFOs did not have to be paid before the District Court’s injunction was stayed.¹⁰⁷ The agent also incorrectly stated that federal litigation only applied to the 17 plaintiffs in *Jones II*.¹⁰⁸ A class was certified and issued on April 7, 2020, expanding the applicability of *Jones II* beyond the 17 plaintiffs.¹⁰⁹ All but two of the individuals in the report registered in July of 2020, which was after the District certified the class and subclass *beyond* the 17 plaintiffs.¹¹⁰ Moreover, all the individuals in the report appear to have been registered and on the rolls by the time the *Jones II* appellate court issued its opinion on September 11, 2020, in which *Jones II* stated that all 85,000 on the rolls were entitled to vote until the

104. *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1230 (N.D. Fla. 2020).

105. FDLE Report, *supra* note 100, at 13.

106. *Id.*

107. *See supra* Part I.

108. FDLE Report, *supra* note 100, at 13 (“It was clear from the litigation that took place with the passing of Amendment 4 restoring convicted felons right to vote in November of 2018, the enactment of the Amendment in January of 2019, and passage of Senate Bill 7066 in July of 2019, the presiding law during 2020 was that convicted felons must satisfy all terms of their sentence to include legal financial obligations. The ensuing appeals in both the state and federal legal system only pertained to the 17 consolidated plaintiffs.”).

109. *See supra* Part I.

110. *See* FDLE Report, *supra* note 86, at 5-9.

State met its self-imposed burden of screening and removing them. The report does not mention the voters being removed from the rolls before they voted. The agent also omitted information favorable to the accused voters that the agent discovered prior to finalizing the report showing that there was an extensive SB 7066 screening breakdown inside the FDLE and Department of State.¹¹¹ The omission by the agent was discovered only because a separate report prepared by the agent was accessed through public disclosures.¹¹²

The Report also misstates the law in its conclusion. It states, “There are clear violations of Florida State Statutes by the [jail residents] who completed registration forms *with affirming they were not convicted felons when, in fact, they were*; and subsequently cast a ballot in the Florida elections” (emphasis added).¹¹³ This is inaccurate and incomplete. People in Florida can register and vote, even if convicted of a past felony, if they have had their rights restored. Indeed, the interviews in the Report reveal that when they registered, they each affirmed that “he was not a convicted felon at the time *or had his rights restored*.”¹¹⁴ This difference is material because having a past felony conviction is not in itself a false affirmation if the individuals *believed* they had their rights restored, especially in light of *Jones II* and the State’s representations during the litigation.¹¹⁵ The issue of good-faith belief is made even more important by the fact that the agent recommended criminal charges even though it concluded that “the overall conclusion from multiple inmate interviews was *they were either told or believed* they were able to legally register and/or vote.”¹¹⁶ All of these incorrect applications

111. See 10 REASONS, *supra* note 8. The FDLE failed to send information to the Division of Elections necessary for SB 7066 screening of individuals with sex offenses. The agent recorded this in a separate report dated December, 2021, yet the agent left out this information, favorable to the people being investigated, in its February 2022 Report. See *Investigative Report*, FLA. DEP’T L. ENF’T (Dec. 9, 2021), <https://www.brennancenter.org/sites/default/files/2022-11/FDLE%20JA-32-0008%20IR%2049%20-%20info%20from%20FDLE%20re%20MOU%20sex%20offender%20checks.pdf> [https://perma.cc/M4VT-SNYX].

112. See 10 REASONS, *supra* note 8; *Investigative Report*, *supra* note 111.

113. See FDLE Report, *supra* note 86, at 13.

114. See *id.* at 5-9 (emphasis added).

115. See *supra* Part I.

116. FDLE Report, *supra* note 100, at 13 (“There are clear violations of Florida State Statutes by the inmates who completed registration forms affirming

of SB 7066 by law enforcement are in themselves problematic. Either SB 7066's broken system is preventing law enforcement from knowing what the law is or the agent intentionally misrepresented the law and facts pertaining to SB 7066 in pursuit of a pro-prosecution narrative.

It is just as concerning that the eligibility determinations of the returning citizens investigated appear to be made solely by the FDLE agent without any mention of election officials being consulted or of the notice and hearing voter removal process being afforded to the voters.¹¹⁷ It does not even state that the report was transmitted to the Division of Elections for an eligibility determination before recommending charges.¹¹⁸ This failure is important because if the voters were not removed from the voter rolls when they voted, they would be eligible to vote at that time under *Jones II*.¹¹⁹ For law enforcement to retroactively criminalize voters for behavior that was not criminal at the time is akin to an *ex post facto* violation. "An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed."¹²⁰ Similarly, even if the State wanted to change the policy it asserted in the *Jones II* oral arguments—that, post-registration, voters are presumed eligible *until* the State meets its self-imposed burden of finding credible and reliable information to the contrary—it cannot do so to retroactively criminalize people who acted lawfully in reliance on the State's policy at the time.

they were not convicted felons when, in fact, they were; and subsequently cast a ballot in the Florida elections. While it is ultimately incumbent upon the registrant to know their own personal circumstances before they affirm such statements, the overall conclusion from multiple inmate interviews was they were either told or believed they were able to legally register and/or vote. It was the ACSOE Director of Outreach Thomas Pyche's role to educate the citizenry about the voting laws and regulations, to arm them with the best knowledge available to determine whether or not they are eligible to register and/or vote.") (emphasis added).

117. Katie LaGrone, *Former Felon Arrested for Voter Fraud Receives Sample Ballot Weeks Before General Election*, ABC ACTION NEWS (Nov. 14, 2022), <https://www.abcactionnews.com/news/election-2022/former-felon-arrested-for-voter-fraud-receives-sample-ballot-weeks-before-general-election> [<https://perma.cc/XK6Z-L3HT>].
118. FDLE Report, *supra* note 100.
119. *See supra* Part I.
120. *Fletcher v. Peck*, 10 U.S. 87, 138 (1810).

Dangers of Improper Local Prosecutions using SB 7066

The Alachua County prosecutor decided to file charges when it received the FDLE Report despite the fact that the report showed the returning citizens in question were precisely the good-faith voters that the *Jones II* court assured would not be subject to prosecution.¹²¹ The Report shows they were in jail when local election officials engaged them as part of a voter drive to register non-convicted people inside the jail.¹²² All of them were led to believe they were eligible to register, and the investigating agent concluded as much.¹²³ They were told that if they were uncertain about their eligibility, they could register and wait to hear back about their eligibility post-registration.¹²⁴ This is consistent with assurances the State gave in *Jones II*: that people could register in good faith and find out about their eligibility post- registration.¹²⁵ All of them heard back from the State indicating they were eligible: they were processed, placed on the rolls, and sent mail- in ballots to vote.¹²⁶ If they were placed on the rolls and left there, the *Jones II* court made clear they were “entitled to vote.”¹²⁷ If these individuals are not vulnerable good-faith voters, then who is? For the

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121. See *Alachua County Supervisor of Elections Denies Wrongdoing in Voter Fraud Investigation*, WCJB (Jun. 4, 2021), <https://www.wcjb.com/2021/06/04/alachua-county-supervisor-elections-denies-wrongdoing-voter-fraud-investigation> [https://perma.cc/2SX6-2TWT]; Kira Lerner, *People with Felony Convictions Received the Right to Vote. Now Some Face Charges.*, LA. ILLUMINATOR (Apr. 28, 2022), <https://lailluminator.com/2022/04/28/florida-gave-voting-rights-to-people-with-felony-convictions-now-some-face-charges-for-voting> [https://perma.cc/CMY7-4Z63]; Gary Fineout, *Voter Fraud Probes Underway in Several Florida Counties*, POLITICO (Mar. 22, 2022), <https://www.politico.com/newsletters/florida-playbook/2022/03/22/voter-fraud-probes-underway-in-several-florida-counties-00019113> [https://perma.cc/99QB-VHK2].
122. FDLE Report, *supra* note 100.
123. *Id.*
124. *Id.*
125. See *supra* Part I (discussing the *Jones II* oral arguments).
126. FDLE Report, *supra* note 100.
127. *Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020).

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Alachua prosecutor to not only ignore all of these mitigating facts, but also ignore *Jones II* and criminally prosecute these individuals at taxpayers' expense is at best a bad understanding of SB 7066 under *Jones II* and at worst bad-faith prosecution.¹²⁸

Dangers of Improper Statewide Arrests and Prosecutions using SB 7066

Governor DeSantis made the creation of the statewide voter police group a top political priority in 2022.¹²⁹ The Florida Legislature approved a bill to create the Office of Election Crimes and Security (OECS) within the Department of State in 2022, and allocated funding for 15 positions and \$1.1 million for the office in the yet-to-be-signed 2023 budget.¹³⁰ While Florida's Legislature funded a voter police group to police the voter rolls, it failed to spend similar amounts to ensure ineligible voters under SB 7066

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128. Indeed, the Alachua Prosecutor's chief investigator is on record materially misrepresenting SB 7066 in ways that could chill eligible voters and lead to more unfounded prosecutions. Regardless of the number of felony convictions, if the felonies are not for murder or felony sexual offense, the right to vote is restored under Amendment 4 and SB 7066 upon completion of sentence and satisfaction of LFOs for the felonies. Yet, news reports have the chief investigator publicly misstating the law, saying "If you're a convicted felon and you have *multiple felonies*, then you know that you don't have the right to vote." See Lerner, *supra* note 121.
129. Anthony Izaguirre, *Florida Governor Signs Bill Creating Election Police Unit*, ASSOC. PRESS (Apr. 25, 2022), <https://apnews.com/article/2022-midterm-elections-covid-health-crime-florida-5fad57fac85e0944b6e8eeb423b195b7> [<https://perma.cc/WJ5Y-ZGQG>].
130. Gray Rohrer, *Gov. DeSantis Signs Bill Creating Election Police Force, Hiking Penalty for Voter Fraud*, FLA. POLS. (Apr. 25, 2022), <https://floridapolitics.com/archives/519297-gov-desantis-signs-bill-creating-election-police-force-hiking-penalty-for-voter-fraud> [<https://perma.cc/BD5K-E9H3>]; see also *Budget Analysis for Florida SB 524*, FLA. SENATE 15 (Feb. 28, 2022) ("The requirement that certain special officers be dedicated to investigating election law violations and the creation of the new Office of Election Crimes and Security may require funding for additional positions. SB 2500 includes an appropriation for the new office, contingent upon the passage of this bill (Specific Appropriations 3146-3151)."), <https://www.flsenate.gov/Session/Bill/2022/524/Analyses/2022s00524.a.p.PDF> [<https://perma.cc/C4V8-T4JV>].

were diligently screened, informed, and kept off the voter rolls during the 2020 election. During the federal trial, the District Court found as a matter of fact that despite implementation of SB 7066 requiring at least 21 additional employees, “the Legislature allocated no funds for additional employees, and the Division has hired none.”¹³¹ Now, the State is taking advantage of its newly created voter police group to arrest the very people it knowingly failed to screen and to whom it intentionally sent voter ID cards.¹³² Seeking to make immediate headlines, the voter police group went after people who likely voted in the 2020 election and who had disqualifying Amendment 4 offenses.¹³³ People convicted of disqualifying offense such as murder or a felony sex offense are easy political targets because the public is less sympathetic towards them or their confusion about eligibility. Still, the voter police group and statewide prosecutors may soon turn towards prosecuting people with disqualifying LFOs like the Alachua prosecutor, not just those with disqualifying offenses. However, even if they only went after people with disqualifying offenses, the mere threatening headlines of “felons prosecuted for voting” can deter eligible returning citizens from registering and voting who do not want to risk any confusion.¹³⁴

Just days before the 2022 primary elections, the voter police group started making disturbing arrests of individuals who had voted in the 2020 election—nearly two years earlier—because they had a past conviction for murder or a felony sex offense. It did not matter that the State led them to believe they were eligible to vote. Governor DeSantis held a press conference, flanked by uniformed law enforcement, to publicize the arrests as an obvious political intimidation tactic aimed at returning citizens.¹³⁵ The Governor warned that this was just the opening salvo and assured that there were more arrests to come.¹³⁶ As noted

131. *Jones v. Governor*, 462 F. Supp. 3d 1196, 1220 (N.D. Fla. 2020).

132. 10 REASONS, *supra* note 8.

133. *Id.*

134. Nicole Lewis & Alexandra Arriaga, *Florida’s Voter Fraud Arrests Are Scaring Away Formerly Incarcerated Voters*, MARSHALL PROJECT (Nov. 4, 2022), <https://www.themarshallproject.org/2022/11/04/florida-s-voter-fraud-arrests-are-scaring-away-formerly-incarcerated-voters> [<https://perma.cc/22WA-MSDY>]; *see also* 10 REASONS, *supra* note 132.

135. 10 REASONS, *supra* note 8.

136. *Id.*

earlier, the State even used its statewide prosecutors to go after local individuals without having the statutory authority to do so.¹³⁷

Racial Partisanship—Racial Apathy and Partisan Motivation

Just as concerning is the fact that the majority of the people targeted by the voter police group and statewide prosecutors are Black voters from Democratic areas.¹³⁸ This is an example of how the administrative state produces administrative burdens that end up being racialized even if state actors have no racial animus in their hearts. The State's broken restoration system is creating and reproducing racial inequality on the right to vote and much of it is by design and neglect.¹³⁹ SB 7066's policy design and failed implementation appeared racially neutral on its face, which allows law makers and law enforcement to claim that they were "just following the rules."¹⁴⁰ However, at trial the State's own expert acknowledged that the party line vote for SB 7066 was due to Republicans' misperception that voting rights restoration benefits Democrats and Republicans' assumption that the Black voters who would be disparately impacted by SB 7066 would overwhelmingly support Democrats.¹⁴¹ To be clear, the concern here is not whether there was racial hate in their hearts, but whether racial considerations were at play in the policy design and implementation as a result of partisan motivation. To target or apathetically neglect a group because of viewpoint differences is by itself undemocratic.¹⁴²

137. Ashley Lopez, *Florida's Effort to Charge 20 People With Voter Fraud Has Hit Some Roadblocks*, NAT'L PUB. RADIO (Dec. 21, 2022), <https://www.npr.org/2022/12/21/1144265521/florida-voter-fraud-cases-prosecution-update> [<https://perma.cc/7LKK-MCT4>].

138. Wayne Washington, *Voter Intimidation? Black Voters Over-represented Among Those Arrested so far for Election Crimes*, PALM BEACH POST (Oct. 10, 2022), <https://www.palmbeachpost.com/story/news/2022/10/10/black-voters-over-represented-among-those-arrested-election-crimes/10436294002> [<https://perma.cc/X3W7-7DKX>].

139. Victor Ray, Pamela Herd & Donald Moynihan, *Racialized Burdens: Applying Racialized Organization Theory to the Administrative State*, 33 J. PUB. ADMIN. RSCH. & THEORY 139 (2023).

140. *Id.*

141. *Jones v. Governor*, 462 F. Supp. 3d 1196, 1236-1237 (N.D. Fla. 2020).

142. *Id.*

SB 7066's sponsors explicitly chose to avoid evidence of racial impact so they could later claim being agnostic on racial impact. However, this also means that the racialized burdens created by SB 7066 were intentionally ignored in the policy design stage and driven by willful blindness and indifference to how the law would create or reproduce existing racial inequality.¹⁴³ Indifference and self-imposed ignorance can be worse than hate at times.¹⁴⁴ Hate is obvious and demands intervention—but apathy provides legal cover and frees state leaders and policy makers from their ethical responsibility of doing the hard work of designing laws that do not reproduce—or that at least reduce—existing racial inequality.¹⁴⁵

The Supreme Court, in *Village of Arlington Heights*, ruled that racially neutral laws are presumed constitutional unless a number of factors prove that race was a motivating factor.¹⁴⁶ After applying *Village of Arlington Heights*, the District Court in *Jones II* concluded that race was not a motivating factor, but admitted it was a close call and that the finding could go either way.¹⁴⁷ The issue is less of a close call now that SB 7066's prosecutions are resulting in Black voters from Democratic areas being disproportionately investigated.¹⁴⁸ Indeed, even the Republican Senator who sponsored SB 7066 expressed concerns about the

143. Ray et al., *supra* note 139.

144. See Leonard Pitts Jr., *MLK and the Silence of Good People*, SEATTLE TIMES (Jan. 20, 2019), <https://www.seattletimes.com/opinion/mlk-and-the-silence-of-good-people/> [<https://perma.cc/PF2P-SEYC>] (quoting Martin Luther King Jr. as saying, “The ultimate tragedy is not the oppression and cruelty by the bad people but the silence over that by the good people”).

145. *Jones*, 462 F. Supp. at 1235; see *Dr. Martin Luther King Jr. - 1966 Convocation*, ILL. WESLEYAN UNIV. (1966), <https://www.iwu.edu/mlk/page-4.html> [<https://perma.cc/Z22E-CDT9>] (quoting Martin Luther King Jr. as saying, “It may well be that we will have to repent in this generation, not merely for the vitriolic words and the violent actions of the bad people . . . but for the appalling silence and indifference of the good people who sit around and say wait on time.”).

146. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

147. *Jones*, 462 F. Supp. at 1235, 1239.

148. The call here is not for the State to arrest and prosecute more white citizens, rather that it arrests and prosecute less Black citizens and that it simply criminalizes less people altogether.

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way SB 7066 is being used by the Governor and his voter police group by saying, “The more I talk about it, the more it’s discussed and the more people find out, the more this feels like these were *political arrests* and not proper arrests.”¹⁴⁹ Political arrests certainly fit the paradigm of bad faith actions.

PART III RECOMMENDATIONS

SB 7066 and the State’s actions under it have created a broken voter restoration system in Florida that is robbing Floridians of the promise of Amendment 4 and the belief in second chances. Returning citizens who have been leading model lives are being denied the opportunity to become civically engaged because of money or fear of prosecution. This hurts not just these voters, but their entire communities, who benefit from their voice and engagement. Below are some policy recommendations to help us, Floridians, get there. These recommendations require the efforts of the Governor and the Legislature, who up to this point do not appear to be acting in good faith. However, this should not discourage us from finding and fighting for good solutions. The current elected leaders may decide to course-correct and/or future office holders may change course. Moreover, if the issue ends back in federal courts, these approaches to proper governance under SB 7066 can inform the remedies in those cases. Lastly, and most important, these policy recommendations should defer to, and be led by, those closest to the problem: those who might regain their franchise after the passage of Amendment 4.

149. Emerald Morrow, *Florida’s Voter Fraud Arrests Show Cracks in Election System*, WTSP (Nov. 7, 2022), <https://www.wtsp.com/article/news/investigations/10-investigates/broken-ballots-floridas-voter-fraud-arrests-show-cracks-election-system/67-d1aeb89f-cfb4-428a-a48c-a0ea10af9e68> [https://perma.cc/Q65R-B8RH], (“I think what people realize is that an overwhelming majority of Floridians supported Amendment 4. And I actually haven’t received any pushback and frankly, largely support for my pushback against the voter arrests. The more I talk about it, the more it’s discussed and the more people find out, the more this feels like these were political arrests and not proper arrests.”).

Governor

The Governor must immediately order the end of state prosecutions based on SB 7066 ineligibility consistent with *Jones II*, Florida election law, and the State's asserted "rule of lenity" policy. The Governor has the power to remove local prosecutors who neglect their duty,¹⁵⁰ which includes protecting good faith voters and upholding the State's election law and policies as asserted by the State and reasoned in *Jones II*. The Governor must communicate this policy to local and statewide law enforcement and prosecutors and to the public to restore confidence in eligible returning citizen voters who may be afraid of voting because of the reports of voter prosecutions.

Good faith registrants who are uncertain about their eligibility, believe they are eligible to register, or are led to register as a form of eligibility-inquiry do not meet the scienter requirement per *Jones II*. Moreover, once a person registers to vote and is placed on the voter rolls and sent a voter ID, that person is entitled to vote until the State proves otherwise and goes through the voter removal process with notice and hearing. Lastly, SB 7066 enforcement should use the State's longstanding, non-criminal voter removal process rather than costly and life altering criminal prosecutions. This will help avoid prosecutions of good faith voters who were mistaken when they registered and reduce the deterring effect on eligible voters who are uncertain or just do not want to risk prosecution.

Legislature

The Florida Legislature has the power to correct course and fix Florida's broken SB 7066 system. While I am loathe to propose reforms that legitimize a bad law which should have never been implemented in the first place, the people suffering under this law deserve to have a bad law be made less harmful if possible. It is only those who are directly impacted who ought to be the ones that decide whether to support or oppose reforming a bad law because they are the ones that will endure the consequences of the decisions.

150. *DeSantis Suspends State Attorney Who Vowed Not to Enforce Florida's New Abortion Law*, POLITICO (Aug. 4, 2022) <https://www.politico.com/news/2022/08/04/desantis-suspends-prosecutor-floridas-new-abortion-law-00049852> [https://perma.cc/9JU5-TB5D].

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Fortunately, the Florida Supreme Court left open the definition of what constitutes “completion,” leaving the Legislature with significant power to reform SB 7066 by creating easy to administer bright-line ways in which LFOs are completed. The Legislature can do the following three basic things to increase voter confidence and integrity on the front end, save tax dollars, and restore the promise of second chances that Floridians believe in and want.

1. The Legislature must establish a reliable voter information system that can inform election officials and voters whether a person is eligible under SB 7066. This system will drastically reduce the likelihood that ineligible voters are mistakenly placed or left on the voter rolls. The system must have safeguards that err on the side of the voter, that allow returning citizens to challenge incorrect state records (like in my situation) and provide legal protections to those who rely on it.¹⁵¹ It must also protect sensitive returning citizen information so as not to propagate hardship in other areas of life such as jobs, housing, education, and consumer finance.¹⁵² How costly this system will be depends on how many LFOs have to be piled into it and tracked. In other words, one way to resolve the issue of cost is to simply eliminate LFOs by deeming them complete as soon as it is legally possible.

2. The Legislature should save taxpayer dollars by creating a duration period after which LFOs are deemed completed for the purpose of voting under Amendment 4 and SB 7066. For example, the Legislature can deem all LFOs complete for the purposes of voting after the completion of the incarceration and/or supervision portion of the sentence. This bright-line rule would eliminate almost all confusion because nearly everyone knows when they are incarcerated or under supervision and when they have completed it. Under this policy, the LFOs would still be owed—separate from voting—while establishing an easy to administer bright line rule after which LFOs do not need to be calculated for voting. This may actually

151. See Chien, *supra* note 20; see also *About Paper Prisons*, *supra* note 20.

152. CATHY O'NEIL, *WEAPONS OF MATH DESTRUCTION* 141-161 (2016) (discussing the hidden effects of e-scores, which are unregulated proxies for creditworthiness that are used in many areas of finance and can use many signals from the digital world, not simply the traditional FICO score—and that publishing a person's court debts or even their felony charges on the public Internet within the reach of search engines, crawlers, scrapers, and bots may have adverse effects in many parts of online and offline life, sometimes without the person's awareness).

increase the likelihood of LFO payments. Returning citizens who vote tend to have lower recidivism rates, which means they are more likely to be in society, paying taxes and their LFOs, rather than incarcerated costing tax dollars and making no payments on LFOs.¹⁵³ Re-enfranchisement does not guarantee civic participation, but keeping people disenfranchised guarantees we lose even the possibility that people will be voting and civically engaged. It is no surprise, therefore, that parole and police organizations have supported re-enfranchisement.¹⁵⁴

This change would dramatically decrease the workload on state employees and save tax dollars for the state because no one would have to research LFOs for voting. The moment that incarceration and supervision are completed for Amendment 4 restoration so are the LFOs for the purpose of voting. Under this type of policy, the centralized voter information system would be less costly and burdensome to maintain as compared to the current LFO system that has no statute of limitation for LFOs. This shift would also ensure that the promise of Amendment 4 becomes a reality even for the indigent because the rich and the poor alike will have their LFOs deemed completed upon completion of incarceration and supervision.

153. *Florida Amendment 4 to Return Felon's Voting Rights: A Conversation with Angel Sanchez*, *supra* note 2 (“Restoring voting eligibility is important to Floridians who care about making Florida safer and economically better. Research shows that individuals who have their voting eligibility restored are less likely to re-offend—that means less crime, less victims, and less tax money spent. Restoring voting eligibility gives people an opportunity to redeem themselves, become civic minded, and gain a stake in their community. In addition to lowering recidivism, a recent economic study on Amendment 4 by the Washington Economic Group (WEG) affirmed that restoring voting eligibility will add 3,600 jobs and produce an annual benefit of \$365 million to the Florida economy.”).

154. *See Jones II*, 975 F.3d 1016, 1107 n.2 (11th Cir. 2020) (Pryor, J., dissenting) (“Reenfranchisement of people convicted of felonies who have served their sentences enjoys broad support, from the American Civil Liberties Union to the American Probation and Parole Association (APPA), a nonprofit organization counting as over 1,700 individual probation or parole officers and more than 200 probation and parole agencies as members. The APPA advocates for ‘restoration of voting rights upon completion of an offender’s prison sentence.’ Police officers, too, have advocated for rights restoration because reintegration of formerly incarcerated people reduces recidivism.” (citations omitted)).

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3. The Legislature must reform its voter registration form¹⁵⁵ and create a non-prosecution safe harbor for good faith citizens who are confused, mistaken, or misled into registering or voting under SB 7066, especially while the system remains broken and there is no centralized database. There is precedent for a non-prosecution safe harbor. SB 7066 added a statutory safe harbor for the months between Amendment 4's enactment (January 8, 2019) and SB 7066's enactment (July 1, 2019). The statute immunized registrants from arrest and convictions during this period. It is worth noting that this safe harbor protected even individuals with disqualifying offenses because the confusion was not limited to people with LFOs.¹⁵⁶ This approach would not preclude enforcement of SB 7066 through the non-criminal voter removal process. It just would preclude criminalizing people because of a broken system. The state must also reform its registration form to protect good faith voters uncertain about their eligibility by adding the underlined to the affirmation in the current form: **I affirm that I am not a convicted felon, or if I am, my right to vote has been restored or I am genuinely uncertain whether my right to vote has been restored.**¹⁵⁷

This approach would reduce fears of prosecution that may be deterring eligible returning citizens from becoming civically engaged. Indeed, voter participation is good for rehabilitation and encourages others around them to become civically engaged, which is good for democracy and even Florida's economy.¹⁵⁸

155. FLA. STAT. § 97.053 (5)(a)(6) (2022) (“A mark in the checkbox affirming that the applicant has not been convicted of a felony or that, if convicted, has had his or her voting rights restored.”).

156. FLA. STAT. § 104.011(3) (2022) (“A person may not be charged or convicted for a violation of this section for affirming that he or she has not been convicted of a felony or that, if convicted, he or she has had voting rights restored, if such violation is alleged to have occurred on or after January 8, 2019, but before July 1, 2019.”).

157. FLA. STAT. § 97.053 (5)(a)(6) (2022) (“A mark in the checkbox affirming that the applicant has not been convicted of a felony or that, if convicted, has had his or her voting rights restored.”).

158. *Florida Amendment 4 to Return Felon's Voting Rights*, *supra* note 2.

CONCLUSION

It is incumbent on democratic governments to not only govern constitutionally but to also act in good faith when it comes to promoting democracy and restraining its prosecutorial powers against its citizens. To do otherwise leads to abuses that undermine democratic governance and individual liberties. Throughout the entire federal litigation in *Jones I* and *Jones II*, Florida downplayed the possibility that good faith voters would be subject to prosecution under SB7066 for mistakenly registering or voting. Neither the *Jones II* dissenters nor the District Court had confidence in the State's assurances,¹⁵⁹ but the *Jones II* majority did. The *Jones II* court dismissed the dissenters' constitutional concerns by reasoning that Florida's scienter "willingness" requirement would limit law enforcement discretion and protect individuals who registered or voted not knowing they were ineligible.¹⁶⁰ The State apparently made this argument for the convenience of litigation. Once the litigation ended the State began prosecuting individuals. Adding further insult to this injustice, the prosecutions have been politically motivated and racialized and have been carried out in ways that would intimidate uncertain but otherwise eligible voters from voting. At the root of the problem is the broken voter restoration system created by SB 7066. Therefore, Florida must immediately cease prosecutions related to SB 7066 until a centralized voter information system is created to clearly and reliably inform election officials and voters of their status.

In 2018, Floridians did something historic: they put people over politics and overwhelmingly supported second chances with their resounding approval of Amendment 4's promise of restoring voting rights to over a million Floridians. Politicians responded with a broken system full of fear and confusion. However, they owe it to Floridians to make good on Amendment 4's promise. Politicians have the opportunity to put people over politics and stop the criminalization of returning citizens under SB 7066. The least they can do is ensure that good faith voters who want to

159. *Jones v. Governor*, 462 F. Supp. 3d 1196, 1229-30 (N.D. Fla. 2020) (doubting State's assertions that "good faith voters need not fear prosecutions" and further doubting "the State's professed tolerance for good-faith mistakes"); see *Jones II*, 975 F.3d 1016, 1092 (11th Cir. 2020).

160. *Jones II*, 975 F.3d at 1035-1036, 1047-48 (rejecting the dissenters concerns and trusting that the scienter requirement would limit law enforcement discretion).

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follow the law are not entrapped into ineligibly voting and that eligible voters who are uncertain and afraid of prosecutions are not deterred from voting. Returning citizens, likely as much as anyone, believe in second chances. This is the State's opportunity at a second chance: a chance to redeem itself and make good on Amendment 4's promise.