No. 20-12003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Kelvin Leon Jones, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

APPELLEES' MOTION TO DISQUALIFY JUDGES ROBERT LUCK, BARBARA LAGOA, AND ANDREW BRASHER

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CERTIFICATE OF INTERESTED PERSONS

Plaintiffs-Appellees hereby certify that the disclosure of interested parties submitted by Defendants-Appellants Governor of Florida and Secretary of State of Florida on July 14, 2020 is complete and correct.

Dated: July 15, 2020

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INTRODUCTION

The *Raysor* and *McCoy* Appellees respectfully request that Circuit Judges Robert Luck, Barbara Lagoa, and Andrew Brasher be disqualified from participating in this case. This case will determine whether three-quarters of a million Floridians can vote; it is especially important the judges deciding this case are themselves qualified to vote on it.

Judges Luck and Lagoa stated in written testimony to the Senate Judiciary Committee they would recuse from any case involving the Florida Supreme Court while they were Justices or in which they played any role—commitments that are triggered here. Their disqualification is required not only because they said so in seeking confirmation, but because the Code of Conduct for United States Judges, incorporated by this Court's Internal Operating Procedures, requires disqualification when judges participated, in a prior judicial position, concerning the litigation. Their failure to adhere to their broad commitments to the Senate Judiciary Committee (and the public), and to the Code of Conduct, would cause their impartiality to "reasonably be questioned," 28 U.S.C. § 455(a). Federal law therefore likewise requires their disqualification.

Judge Brasher served as Solicitor General of Alabama, and in that capacity was counsel of record in *Thompson v. Alabama*, No. 16-cv-783-ECM-SMD (M.D. Ala.), a case challenging the same government policy challenged by plaintiffs in this

case, and which all parties have designated as a "related case." In that capacity, Judge Brasher wrote and signed multiple briefs arguing the same legal positions advanced by Appellants in this case. His co-counsel at the time, whom he supervised, remains counsel for defendants in that case, and has filed an *amicus* brief supporting Appellants here. In seeking confirmation from the Senate, Judge Brasher pledged to recuse from any case involving a government policy that he previously defended, and for two years to recuse from any case in which the Alabama Attorney General's Office represents a party. His recusal is required in keeping with his public commitment, the Code of Conduct, and federal law.

FACTS AND PROCEDURAL HISTORY

I. The Florida Supreme Court Proceeding

In 2018, Floridians adopted a constitutional amendment automatically restoring the right to vote to people with past felony convictions upon "completion of all terms of sentence including probation and parole."[1] Fla. Const. Art. VI, § 4. The legislature then enacted Senate Bill 7066, defining "completion of all terms of sentence" to include full payment of legal financial obligations ("LFOs") ordered by a court as part of the sentence. Fla. Stat. § 98.0751(2)(a).

[1] The Amendment does not apply to those convicted of murder or a felony sexual offense. Fla. Const. Art. VI, § 4.

Appellees, in three suits, brought claims alleging, *inter alia*, that conditioning rights restoration on payment of LFOs constitutes wealth discrimination in violation of the Fourteenth Amendment, and constitutes a poll or other tax in violation of the Twenty-Fourth Amendment; and that Florida's system for administering the LFO requirement violates due process. The cases were consolidated under *Jones v. DeSantis*, 4:19-cv-300.[2] Throughout the litigation, including this appeal, Appellants Governor DeSantis and Secretary Lee[3] have contended that voters would not have enacted Amendment 4 but for its requirement that people pay off their LFOs even if they cannot afford to do so, and that the pay-to-vote requirement.

In September 2019, Appellant Governor DeSantis requested an Advisory Opinion from the Florida Supreme Court as to whether the phrase "all terms of sentence" under article VI, section 4 of the Florida Constitution included payment of LFOs. *See* Request for Advisory Opinion, No. SC19-1341 (Fla. Aug. 9, 2019).

[2] The consolidated cases were initially before Judge Walker of the Northern District of Florida. Judge Walker recused himself weeks into the litigation because Appellant Secretary Lee retained additional counsel from the law firm Holland & Knight, at which Judge Walker's wife is a partner. *See* Order of Recusal at 1-2, 4:19-cv-300, ECF 86 (finding that Secretary Lee's conduct was "deeply troubling," and citing a past instance where the firm was disqualified from a case in his court given, *inter alia* "the potential for manipulation of the judicial system [and] the lack of need by Defendants for this particular counsel.").

[3] For ease of reference, we refer to the Governor and Secretary as "the State."

The Florida Supreme Court, including then-Justices Luck and Lagoa, set oral argument for November 6, 2019.

The *Raysor* Plaintiffs briefed the precise constitutional questions at issue in this matter in the Florida Supreme Court proceedings, contending that because an LFO requirement would violate the United States Constitution, the Florida Supreme Court had an obligation to interpret the relevant state constitutional provision to avoid a conflict with the United States Constitution.[4] The *Raysor* and *Gruver* Plaintiff and counsel organizations also briefed the issue of the voters' intent in passing Amendment 4, including whether voters intended to allow rights restoration only for those able to pay off their LFOs.

During oral argument, counsel for the *Raysor* and *Gruver* Plaintiffs engaged in colloquies with both Justice Luck and Justice Lagoa about the importance of interpreting Amendment 4 in light of the United States Constitution, as well as the application of this Court's and the United States Supreme Court's precedent with respect to both wealth discrimination and poll taxes to the challenged provision.

[4] *Raysor* Br., *Advisory Opinion to the Governor Re: Implementation of Amendment 4*, No. SC19-1341 (Fla. Sept. 18, 2019), https://efactssc-public.flcourts.org/casedocuments/2019/1341/2019-1341_brief_134897_initial20brief2dmerits.pdf; *Raysor* Reply Br., (Oct. 3, 2019), https://efactssc-public.flcourts.org/casedocuments/2019/1341/2019-1341_brief_135131_reply20brief2dmerits.pdf.

On October 15, 2019, after the advisory opinion was requested but before participating in oral argument, Justices Luck and Lagoa were nominated to seats on this Court. Each submitted written testimony to the Senate Judiciary Committee. *See* Ex. A (Lagoa QFR Reponses); Ex. B (Lagoa Questionnaire Reponses); Ex. C (Luck QFR Responses); Ex. D (Luck Questionnaire Responses). Judge Luck pledged to recuse "from *any case where I ever played any role*." Ex. D at 56 (Luck Questionnaire Responses) (emphasis added). Judge Lagoa pledged to recuse "from cases . . . *involving* either the Supreme Court of Florida or the Florida Third District Court of Appeals while I was a member of either court." Ex. A at 24 (Lagoa QFR Responses) (emphasis added). After participating in oral argument, Judge Luck was confirmed to this Court on November 19, 2019, and Judge Lagoa on November 20, 2019. The Florida Supreme Court released its Advisory Opinion on January 16, 2020.

II. The *Thompson v. Alabama* Related Case

Appellants Governor DeSantis and Secretary Lee noticed *Thompson v. Alabama*, No. 2:16-cv-783 (M.D. Ala.), as a related case in this action.[5] *Thompson*, filed in 2016, challenges Alabama's rights restoration scheme, and plaintiffs challenged the same governmental policy at issue here, namely that Alabama's

[5] Appellees agree *Thompson* is a related matter and this Court's decision may be dispositive of issues pending in *Thompson*.

requirement that individuals pay their LFOs as a condition of rights restoration violates the Fourteenth Amendment as applied to those unable to pay, and constitutes a poll tax in violation of the Twenty-Fourth Amendment. The case is still pending in the Middle District of Alabama.

Judge Andrew L. Brasher of this Court served as lead counsel for the Defendants in *Thompson* from October 12, 2016 through July 7, 2018 in his capacity as Solicitor General for the State of Alabama, including by presenting oral argument for the State in the case. Judge Brasher was confirmed to this Court on February 11, 2020, and was sworn into this Court on June 30, 2020. Before being elevated to this Court, Judge Brasher was confirmed as a U.S. District Court Judge for the Middle District of Alabama on May 1, 2019.

ARGUMENT

I. Legal Standard

A federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988). And, "the standard for recusal under § 455(a) is whether an objective, disinterested, lay observer, fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the

judge's impartiality." *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989). (internal quotations omitted); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 & n.12 (11th Cir. 1988) (emphasizing that the test is whether a "lay observer," and not one "trained in the law," would reasonably question the judge's impartiality). Under this standard, all doubts must be "resolved in favor of recusal." *Id*. Further, "objective standards may also require recusal whether or not actual bias exists or can be proved." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 886 (2009) (citing *In re Murchison*, 349 U.S. 133, 136 (1955), for the proposition that "[d]ue process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'"). Thus, 455(a) "clearly mandates . . . a judge err on the side of caution and disqualify himself in a questionable case." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1112 (5th Cir. 1980). Section 455(a)'s disqualification requirement "expand[s] the protection" of the specifically required disqualification scenarios of § 455(b).[6] *Liteky v. United States*, 510 U.S. 540, 552 (1994).

The Code of Judicial Conduct for United States Judges is more explicit with respect to prior judicial roles: it provides that judges *shall* be disqualified based upon

[6] For example, under §455(b), a judge must recuse "where he served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy," *id.*, § 455(b)(3).

a prior position as a judge related to the matter. Under Canon 3(C)(1), a judge must disqualify

> in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge . . . has served in governmental employment and *in that capacity participated as a judge (in a previous judicial capacity)* [or] counsel . . . *concerning the proceeding*.

Canon 3(C)(1)(a), (e) (emphasis added). A "proceeding" is defined broadly, and includes "pretrial, trial, appellate review, or *other stages of litigation*." *Id*. 3(C)(3)(d) (emphasis added). Because Canon (3)(C)(1) states the "judge's impartiality might reasonably be questioned," if he or she participates in a proceeding after this type of prior involvement, the Canon ties back to Section 455(a), which *requires* disqualification when such reasonable questions are possible.

Finally, the Code also instructs judges to "avoid impropriety and the appearance of impropriety in all activities," Canon 2, and specifically to "respect and comply with the law and [to] act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," Canon 2(A). "An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances . . . would conclude that the judge's honesty, impartiality, temperament, or fitness to serve as a judge is impaired." Commentary to Canon 2(A). Violations of the Code may, on their own, be sufficient to "destroy[] the appearance

of impartiality and thus violate[] § 455(a)." *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 114-15 (D.C. Cir. 2001).

Under the Eleventh Circuit's Internal Operating Procedures, "[a] judge is disqualified under circumstances set forth in 28 U.S.C. § 455 or in accordance with Canon 3C, Code of Conduct for United States Judges as approved by the Judicial Conference of the United States, April 1973, as amended." Fed. R. App. P. 47, 11th Cir. IOP 9.

II. Judges Luck and Lagoa Are Disqualified from Participating in this Appeal.

Judges Luck and Lagoa are disqualified from participating in this case. Both judges pledged in written responses to the Senate Judiciary Committee that they would recuse from cases involving the Florida Supreme Court during their service in that Court. This is such a case. The Code of Judicial Conduct, adopted by this Court's Internal Operating Procedures, specifically requires their recusal, and their failure to adhere to their Senate confirmation testimony and the Code's provisions would cause their impartiality to "reasonably be questioned." 28 U.S.C. § 455(a).

In her written responses to the Questions for the Record from the Senate Judiciary Committee, Judge Lagoa pledged, "If confirmed, I would conscientiously review and follow the standards for judicial recusal set forth in 28 U.S.C. § 455(a) and the Code of Conduct for United States Judges." Ex. A at 24 (Lagoa QFR Responses). She further stated, "In terms of specific examples of the types of cases

I would recuse from if confirmed, I would recuse from cases in which my husband or his law firm appeared, as well as cases *involving* either the Supreme Court of Florida or the Florida Third District Court of Appeals while I was a member of either court." *Id*. (emphasis added). In her response to the Judiciary Committee's Questionnaire for Judicial Nominees, Finally, Judge Lagoa stated, "Although unlikely to occur, I would recuse myself from any case in which I participated as a justice on the Supreme Court of Florida." Ex. B at 54 (Lagoa Questionnaire Responses).

In his written responses to the Questions for the Record from the Senate Judiciary Committee, Judge Luck wrote, "The impartiality of judges, and the appearance of impartiality, are important for ensuring public confidence in our federal courts. . . . I will consult 28 U.S.C. § 455 and the Code of Conduct for United States Judges . . . . I anticipate that there will be matters from which I will need to recuse myself, most notably cases on which I served as a lawyer, or as a trial or appellate judge." Ex. C at 15-16 (Luck QFR Responses). In his response to the Judiciary Committee's Questionnaire for Judicial Nominees, Judge Luck categorically stated, "If confirmed, I will recuse myself from any case where I *ever played any role*." Ex. D at 56 (Luck Questionnaire Responses) (emphasis added).

This case falls squarely within the Judges' recusal commitments. The Florida Supreme Court's Advisory Opinion proceeding was a stage of this litigation.

Appellant Governor DeSantis cited the federal lawsuit as his reason for requesting an Advisory Opinion regarding Amendment 4,[7] the parties to this case were parties to the Florida Supreme Court proceeding,[8] and counsel in this case argued the case in the Florida Supreme Court proceeding. The *Raysor* Plaintiffs' briefing in the Florida Supreme Court raised all the same arguments that are before this Court in urging the Florida Supreme Court to employ constitutional avoidance principles in interpreting Amendment 4.[9] And the voters' intent in adopting Amendment 4 was central to both the Florida Supreme Court's proceeding and to the severability argument the State raises here. It is therefore no surprise Appellants Governor DeSantis and Secretary Lee listed the Advisory proceeding as "involv[ing] an issue that is substantially the same, similar, or related to an issue in this appeal" during

[7] Request for Advisory Opinion, Voting Restoration II, No. SC19-1341 (Fla. Aug. 9, 2019).

[8] The *Raysor* Plaintiffs, who are the representatives of the certified class in this action, the *Gruver* Plaintiff and counsel organizations, Appellant Governor DeSantis, and Appellant Secretary Lee all appeared as parties in the Florida Supreme Court proceeding. *See Advisory Opinion to the Governor Re: Implementation of Amendment 4*, No. SC19-1341 (Fla. 2019), http://onlinedocketssc.flcourts.org/DocketResults/CaseDocket?Searchtype=Case+Number&CaseTypeSelected=All&CaseYear=2019&CaseNumber=1341.

[9] *Raysor* Br., *Advisory Opinion to the Governor Re: Implementation of Amendment 4*, No. SC19-1341 (Fla. Sept. 18, 2019), https://efactssc-public.flcourts.org/casedocuments/2019/1341/2019-1341_brief_134897_initial20brief2dmerits.pdf.

their appeal of the preliminary injunction. *See* Civil Statement, *Jones v. Governor*, No. 19-14551 (11th Cir. Dec. 13, 2019).

Indeed, the State has repeatedly invoked the Florida Supreme Court proceedings in its appeal. *See* State's Brief at 1, 8-9, 54.[10] In particular, the State contends that if the district court's constitutional rulings are affirmed, then Amendment 4 must be invalidated as non-severable. *Id.* at 54. The State's argument regarding the voters' intent in passing Amendment 4 is the precise argument it made to the Florida Supreme Court, and it relies on the Florida Supreme Court's Advisory Opinion to advance its argument on appeal.[11] *Id.* (suggesting that the "district court's contention that the payment of financial terms was not 'critical to a voter's decision' is belied by the Florida Supreme Court's [Advisory Opinion]").[12]

Moreover, then-Justices Luck and Lagoa actively participated in argument on both the constitutional avoidance issues raised by the *Raysor* Plaintiffs and the question of the voters' intent in adopting Amendment 4—issues Appellants have

[10] The State filed an opening brief on appeal pursuant to the initial briefing schedule, which has been superseded by the *en banc* briefing schedule. The State has not yet filed its *en banc* brief.

[11] The State is wrong that a severability analysis is necessary. In any event, any infirm provisions would be severable as the *Jones I* panel and the district court found. Regardless, the State's repeated invocation of the Florida Supreme Court proceedings to advance its arguments underscores the necessity for disqualification here, regardless of the lack of merit to the State's argument.

[12] The State cited the Florida Supreme Court's Advisory Opinion more than any other source in its Trial Brief. *See* ECF No. 336 at 2, 3, 7, 8, 10, 28.

raised repeatedly in the district court and on appeal. *See* Fla. Supreme Court Official YouTube Channel Video Recording, *SC19-1341 Advisory Opinion to the Governor Re: Implementation of Amendment 4, (Voting Restoration)*, https://www.youtube.com/watch?v=jbsNFmdZnEk&t=3253s at 1:01:20-57 (Justices Luck and Lagoa commenting that the inability to pay principle announced by this Court in *Johnson v. Governor*, 405 F.3d 1214 (11th Cir. 2005) (*en banc*) did not apply to restitution); *id.* at 18:27-34 (Justice Lagoa stating that "voters were also told . . . in different editorials and opinion pieces throughout the state" that Amendment 4 included LFOs); *id.* at 44:16-58 (Justice Lagoa reading from a voter guide and an op-ed suggesting Amendment 4 contained required payment of LFOs and saying "this is what was told to the voters of Florida"); *id.* at 51:13-34 (Justice Luck suggesting that the voters would have had a "plain understanding" of Amendment 4's inclusion of LFOs because of the "natural reading" of the Amendment using both plural and singular of "term" in different sentences of the provision); *id.* at 53:23-54:04 (Justice Lagoa commenting on 'the public's understanding" of Amendment 4 and holding up printouts of "reams . . . of op-ed pieces and editorials from different papers all over the State of Florida that made it clear this included restitution and fines"—material that was not part of the record of the proceedings, and that did not include the contrary examples voters also saw during the campaign); *id.* at 1:04:27-49 (Justice Luck commenting that reading

"articulated by Justice Lagoa after looking at everything" would require payment of LFOs); *id.* at 1:03:36-2:04:08 (Justice Lagoa reading from an editorial mentioning LFOs); *id.* at 1:10:36-1:11:55 (Justice Lagoa reading from letter sent after Amendment 4's adoption).

Then-Justice Lagoa pointedly raised the severability argument that the State has advanced both in the district court and this Court, even though that argument was not before the Florida Supreme Court. When counsel suggested that if the Amendment was ambiguous, it must be read consistent with the United States Constitution, Justice Lagoa asked, "Well, should we do that, or should it be stricken?" *Id.* at 52:33-53:05.

This is plainly a case "involving the Supreme Court of Florida" while Judge Lagoa "was a member of [that] court." Ex. A at 24 (Lagoa QFR Reponses). Likewise, it is plainly a case where Judge Luck "ever played any role." Ex. D at 56 (Luck Questionnaire Responses). Both judges pledged to the Senate (and the public) in seeking confirmation that they would recuse in precisely this type of case, and must do so here.

Even absent explicit pledges to recuse, Judges Luck and Lagoa would still be disqualified from participating in this case by the Code of Conduct for United States Judges, which provides judges shall be disqualified if they "ha[ve] served in governmental employment and in that capacity participated as a judge (in a previous

judicial capacity) . . . concerning the proceeding." Canon 3(C)(1). "[P]roceeding is broadly defined to include "pretrial, trial, appellate review, or *other stages of litigation*." *Id*. 3(C)(3)(d) (emphasis added). The Florida Supreme Court proceeding fits squarely within the Code's definition of a proceeding in which Judges Luck and Lagoa participated in a previous judicial capacity.

The Code encompasses the Florida Supreme Court's proceeding in two ways. First, Canon 3(C)(1)'s plain text reaches not just a judge's prior role *in the specific case*, but rather any prior judicial role *concerning* the proceeding. *See* Black's Law Dictionary (Online 2d ed.) (defining "concerning" to be "relating to; pertaining to; affecting; involving; or taking part in"); *cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (defining "relating to" as "to stand in relation; to have bearing or *concern*; to pertain" and finding that "the ordinary meaning of these words is a broad one.") (emphasis added). This broad language encompasses the related Florida Supreme Court proceeding initiated by the Governor in response to the proceedings below. Second, "proceeding" is broadly defined to include "other stages of litigation." Canon 3(C)(3)(d). The Florida Supreme Court's proceeding was closely intertwined with the federal case, as demonstrated by the State's briefing in the federal case—including now on appeal—and the *Raysor* Plaintiffs' briefing before the Florida Supreme Court. Any objective lay observer would conclude the Florida Supreme Court's Advisory Opinion proceeding was a "stage[ ] of litigation"

in the dispute pending before this Court. The Code requires that Judges Luck and Lagoa be disqualified. So too do this Court's Internal Operating Procedures. *See* 11th Cir. IOP 9.

Moreover, under 28 U.S.C. § 455(a), judges "shall disqualify [themselves] in any proceeding in which [their] impartiality might reasonably be questioned." Judges Lagoa and Luck pledged broadly to recuse from any case involving the Florida Supreme Court while they were Justices, or cases in which they had participated in any way. Given their breadth, any objective layperson would conclude these commitments—made to secure confirmation by the Senate—reach the judges' participation in the Florida Supreme Court proceeding in this matter. The State has placed that proceeding at center stage in this appeal, relying upon it to contend—erroneously—that Amendment 4 should be invalidated in its entirety if the State cannot maintain its pay-to-vote system.

Given the sweeping recusal commitments made to the Senate Judiciary Committee (and the public), the judges' failure to recuse would lead an objective lay observer to question *why* they abandoned those pledges. Failing to follow those commitments (and the Code) would thus cause their impartiality to "reasonably be questioned," 28 U.S.C. § 455(a), requiring their disqualification. This is particularly so given this is not a case of random assignment, but rather one in which the active judges have made an affirmative choice to hear the case.

III. Judge Brasher Is Disqualified from Participating in this Appeal.

Judge Brasher is disqualified because as Solicitor General of Alabama he participated as lead counsel in *Thompson*, which all parties agree is a related case in this appeal and in which then-Solicitor Brasher raised the same legal arguments to defend against plaintiffs' wealth discrimination and poll tax claims as the State does here. *Thompson*'s outcome on those claims will likely be controlled by the decision in this case. Judge Brasher's disqualification is required for several reasons.

First, Judge Brasher made a sweeping commitment to the Senate Judiciary Committee (and the public) to recuse in cases such as this: "I intend to recuse from any current or future case that challenges *a government law or policy* that I have previously defended." Ex. E at 48 (Brasher Circuit Questionnaire Responses) (emphasis added). Moreover, Judge Brasher stated, "For a reasonable period of time, I anticipate recusing in cases in which the Office of the Alabama Attorney General represents a party" and to "evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis and determine appropriate action with the advice of parties and their counsel, including recusal where necessary. *Id.* at 48. Likewise, during his confirmation to the Middle District of Alabama, Judge Brasher pledged to recuse from "all cases" where the Office of the Alabama Attorney General represents a party "for a period of two years." Ex. F at 39 (Brasher District Questionnaire Responses).

This broad commitment to the Senate Judiciary Committee (and the public) requires his recusal in this matter. This case involves the same "government law[s] or polic[ies]" he defended as Solicitor General—that conditioning automatic rights restoration on payment of LFOs constitutes wealth discrimination in violation of the Fourteenth Amendment and violates the Twenty-Fourth Amendment. Judge Brasher filed several motions arguing the merits of the legal issues currently before this Court, including *inter alia*, the application of the Equal Protection Clause and the Twenty-Fourth Amendment to rights restoration schemes, the constitutionality of conditioning rights restoration on payment of LFOs, the standard of scrutiny applicable to wealth discrimination claims, and the application of Supreme Court and this Circuit's precedent to these issues. *See, e.g.*, Def.'s Mot. to Dismiss at 63, *Thompson v. Alabama*, 2:16-cv-00783 (M.D. Ala. Mar. 15, 2018), ECF No. 43 (attached here as Ex. G) ("Requiring felons to pay LFOs does not violate the Equal Protection Clause."); *see also*, *id.* at 63-64 (arguing rights restoration schemes are subject to rational basis review and that conditioning voting on payment of LFOs serves rational state interests, because, *inter alia*, "only those convicted felons who have fully paid restitution are sufficiently rehabilitated to be entitled to vote"); *id.* at 64 ("A requirement to pay all LFOs also does not violate the Twenty-Fourth Amendment."); *id*. at 65 (arguing that "fees imposed on the restoration of felon voting rights are not poll taxes because they are not a condition to exercise a

constitutional right but a condition to regain a right that was constitutionally removed."); *id*. at 68 (submitted and signed by Andrew L. Brasher).

Second, even if Judge Brasher had not committed to recuse in cases such as this, the closeness of the *Thompson* case to this case would compel his disqualification. *See In re Hatcher*, 150 F.3d 631 (7th Cir. 1998) (disqualifying a judge even though the potential for bias arose out of separate proceeding, when "the earlier proceedings were so close to the case now before the judge that disqualification under § 455(a) was the only permissible option."); *see* 28 U.S.C. § 455(b)(3) (requiring disqualification where judge "has served in governmental employment and in such capacity participated as counsel . . . concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy"); *see also* Code of Judicial Conduct for United States Judges, Canon 3(C)(1)(e).

Third, Judge Brasher is disqualified because Alabama, represented by the Office of the Alabama Attorney General (in particular, counsel Judge Brasher supervised as Solicitor General in the *Thompson* case), has appeared as an *amicus* in support of the State in this appeal. *See* Br. of Alabama, et al, as *Amici Curiae* at 10-11, *Jones v. DeSantis*, No. 20-12003 (June 9, 2020) ("Since 2016, Alabama has been defending its reenfranchisement system against arguments that States cannot constitutionally require each felon to satisfy his entire sentence before regaining the

franchise") (citing *Thompson v. Alabama*, No, 2:16-cv-783, Compl. at ¶¶ 245-252 (N.D. Ala. filed Sept. 26, 2016)); *see Variable Annuity Life Ins. Co. v. Clark*, 13 F.3d 833, 835 (5th Cir. 1994) (noting that the *amici* and their counsel had caused a number of judges to be recused, making *en banc* review impossible, and noting that "counsel are advised that the participation as amici curiae . . . can result in the recusal of judges because of the identity of the amici and/or their counsel") (Smith, J., dissenting from denial of reh'g *en banc*). This is the second time Judge Brasher's former colleagues have appeared on behalf of Alabama as an *amicus* in this case. *See Jones v. DeSantis*, No. 19-14551 (11th Cir. Mar. 4, 2020). Alabama's participation in this appeal to advance its interest in litigation Judge Brasher previously spearheaded requires his disqualification both as a matter of law and because he committed to recuse for a two-year period in matters involving the Alabama Office of the Attorney General. Finally, Alabama's brief raises the precise "government law or policy" that he defended—the law challenged in *Thompson*. Ex. E at 48 (Brasher Circuit Questionnaire Responses)

Fourth, Judge Brasher's disqualification is required by § 455(a). If Judge Brasher were to participate in this case, an objective lay observer would reasonably question his impartiality. Such an observer would wonder why he participated in this case contrary to his commitment to the Senate Judiciary Committee (and the public) to recuse from any case involving a government law or policy he had defended and

any case involving the Office of the Alabama Attorney General. It would reasonably give rise to a belief that his participation was motivated by partiality. Moreover, Judge Brasher's service as lead counsel in *Thompson* for nearly two years and through multiple rounds of briefing defending against nearly identical legal claims, and raising the same legal arguments advanced by the State here, would lead a reasonable and objective lay observer to "entertain a significant doubt about [his] impartiality." *Kelly*, 888 F.2d at 745. And those doubts would only multiply given that the attorneys Judge Brasher supervised as lead counsel in *Thompson* have appeared in this case, in support of the State, to advance Alabama's interests in the case where he previously served as lead counsel.

CONCLUSION

Disqualification is required for each of the judges. Any attempt to avoid recusal by parsing the text of the judges' commitments to the Senate would itself give rise to an obligation to disqualify, given Congress's command that questionable cases be resolved in favor of disqualification. This case, determining whether approximately 750,000 individuals have a right to vote, will be subject to close public scrutiny whatever the result. The Court must ensure that the legitimacy of its decision is not at issue.

July 15, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Motion complies with the type-volume limitations of Fed. R. App. P. 27 because it contains 5,027 words.

This Response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Response has been prepared in a proportionally spaced typeface using Microsoft Word for Office in 14-point Times New Roman font.

Date: July 15, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on July 15, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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