A POLL TAX BY ANOTHER NAME: CONSIDERING THE CONSTITUTIONALITY OF CONDITIONING NATURALIZATION AND THE "RIGHT TO HAVE RIGHTS" ON AN ABILITY TO PAY

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Permanent residents must naturalize to enjoy full access to constitutional rights, particularly the right to vote. However, new regulations from U.S. Citizenship and Immigration Services (USCIS), finalized in early August and originally slated to go into effect one month before the 2020 election, would drastically increase the cost of naturalization, moving it out of reach for many otherwise-qualified permanent residents, while at the same time abolishing any meaningful fee waiver for low-income applicants. In doing so, USCIS has sought to condition naturalization and its attendant rights on an individual's financial status.

In this Essay, I juxtapose the new fee regulations with a growing caselaw and scholarly literature about financial status, voting, and an individual's ability to pay. Placed alongside the ability-to-pay caselaw—including Griffin v. Illinois *and* Bearden v. Georgia *and, more recently, the litigation about Florida's felony disenfranchisement provisions—it is clear that the new fee policies should be seen as due process and equal protection violations and struck down. I conclude by noting possibilities for litigation or legislation that would preserve a meaningful safety valve to allow low-income individuals to realize the full benefits of naturalization and access all the rights that come with it.*

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> "Give me your tired and your poor who can stand on their own two feet . . . ."
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> — Kenneth Thomas Cuccinelli II, then-Acting Director of U.S. Citizenship and Immigration Services.[1]

INTRODUCTION

Citizenship entails, in Chief Justice Earl Warren's Arendtian formulation, "nothing less than the right to have rights."[2] Naturalization is the gatekeeping process that conditions access to those rights, and it represents a key inflection point at which, after years in waiting, individuals can finally realize the full protection of every constitutional privilege and right, except serving as President.[3]

New regulations from United States Citizenship and Immigration Services (USCIS), however, condition access to those rights on an ability to pay thousands of dollars in fees. Under the new rules, the fee to apply for naturalization alone will cost $1170, an increase of eighty-three percent.[4] At the same time, the regulations abolish fee waivers—a necessary safety valve for lower-income noncitizens—for almost all applications.[5] While the fee increase will move naturalization out of reach for a larger percentage of those eligible, the abolition of the fee waiver will mean that many qualified individuals will be denied the ability to naturalize *solely* because of their inability to pay.

It is hard to imagine many other contexts in which charging $1170 for the right to vote (and the other rights bundled with citizenship) would

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1 Sasha Ingber & Rachel Martin, *Immigration Chief: 'Give Me Your Tired, Your Poor Who Can Stand On Their Own 2 Feet,'* NPR (Aug. 13, 2019, 10:38 AM), https://www.npr.org/2019/08/13/750726795/immigration-chief-give-me-your-tired-your-poor-who-can-stand-on-their-own-2-feet.

2 Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting); *see also* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296–97 (1973) (noting "the existence of a right to have rights . . . and a right to belong to some kind of organized community" made visible "when millions of people emerged who had lost and could not regain these rights because of the new global political situation").

3 *See, e.g.*, L. Xia v. Tillerson, 865 F.3d 643, 650 (D.C. Cir. 2017) ("Citizenship is among the most momentous elements of an individual's legal status . . . . Many invaluable benefits flow from United States citizenship . . . .").

4 U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefits Request Requirements, 85 Fed. Reg. 46,788, 46,792, 46,830 (Aug. 3, 2020) (to be codified at 8 C.F.R. § 106.2(b)(3)) [hereinafter Fee Waiver Final Rule]; U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefits Request Requirements, 84 Fed. Reg. 62,280, 62,316 (proposed Nov. 14, 2019) [hereinafter Fee Waiver Proposed Rule].

5 Fee Waiver Final Rule, *supra* note 4, at 46,790; Fee Waiver Proposed Rule, *supra* note 4, at 62,299.

withstand constitutional scrutiny.[6] But the naturalization regulations—particularly the abolition of a meaningful fee waiver—stand at the intersection of several challenging and unsettled areas of constitutional analysis. Immigration exceptionalism often results in watered-down constitutional protections for noncitizens or a de facto authorization for the federal government to adopt discriminatory distinctions it could not apply to citizens.[7] Even for citizens, challenges to actions that discriminate on the basis of financial status alone do not always fit neatly into the now-familiar tiers of scrutiny.[8] However, there is a growing body of caselaw and scholarly literature about the ability to pay and the constitutionality of conditioning access to vital government services and fundamental rights on an individual's financial status.[9]

In this essay, I will place the new fee regulations in conversation with this ability-to-pay caselaw and discuss the ways in which that caselaw clarifies how we should evaluate the lawfulness of USCIS's proposals. I begin by briefly outlining the naturalization process and the role fees play in it. While the government would probably suggest the fees are merely minor administrative adjustments, they have the potential to prevent thousands of statutorily eligible lawful permanent residents from becoming United States citizens each year. I will then describe the recent caselaw regarding ability-to-pay, paying special attention to cases about felony disenfranchisement. The caselaw helps demonstrate that the USCIS fee policies preventing individuals from obtaining citizenship, and from accessing all the rights attendant on it, merely because they cannot pay, are unconstitutional under the Due Process and Equal Protection Clauses as applied to those individuals genuinely unable to pay the fees. I conclude by discussing ways in which that remedy may be granted through litigation or legislation.

I
BACKGROUND ON NATURALIZATION

The Constitution gives Congress the responsibility "[t]o establish an uniform Rule of Naturalization" throughout the United States.[10] The clause was adopted to remedy a lack of uniformity—at the time the Constitution

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6 One exception, of course, is the felony disenfranchisement provisions detailed *infra* notes 64–94 and accompanying text.

7 *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

8 *See* Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 401–02 (2019) ("The Court has suggested economic class is not a suspect class. Yet wealth disparities do still receive careful equal protection scrutiny, just not based on equal protection alone.").

9 *See infra* notes 51 & 62 and accompanying text.

10 U.S. CONST. art. I, § 8, cl. 4.

was ratified, each state had its own naturalization process and procedure.[11] The clause, adopted without too much debate, was meant to clarify the federal government's role in setting the terms of naturalization.[12]

Over time, Congress has modified the precise requirements for citizenship. At present, lawful permanent residents, colloquially known as "green card holders," are eligible to become citizens after five years[13] provided they are eighteen or older,[14] meet various residency and physical presence requirements,[15] can establish "good moral character,"[16] and demonstrate a knowledge of basic English and civics.[17] Several of these requirements could easily raise line-drawing concerns, although courts have rarely closely scrutinized the requirements themselves.[18]

The lack of scrutiny is based in part on the forgiving standards of review noncitizens face when they seek to challenge the *federal* government's discriminatory conduct. *Yick Wo v. Hopkins* affirmed that noncitizens have the right to equal protection,[19] and later cases confirmed that, for state governments, discriminating based on alienage gives rise to strict scrutiny.[20] But longstanding doctrines related to plenary power, immigration exceptionalism, and federal control over immigration policy as incident to sovereignty mean that discrimination by the political branches will largely be upheld under looser standards of review.[21] One of the most painful examples is that

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11 *See* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870, at 214–18 (1978) (describing the naturalization laws of various states during the years following the signing of the Declaration of Independence).

12 *Id.* at 224.

13 8 U.S.C. § 1427(a)(1) (2018).

14 8 C.F.R. § 316.2(a)(1) (2020).

15 8 U.S.C. § 1427(a)–(c) (2018) (detailing a list of requirements related to residence, absence from the United States, and physical presence).

16 *Id.* §1427(a). Good moral character is defined by 8 U.S.C. § 1101(f), which precludes such a finding for "habitual drunkard[s]," individuals convicted of "aggravated felon[ies]" and several other categories of offenses, and individuals who make a false claim of citizenship or give false testimony to procure immigration benefits, among others.

17 8 U.S.C. § 1423(a) (2018). Notably, both requirements shall "not apply to any person who is unable because of physical or developmental disability or mental impairment to comply" or who is above a certain age and meets additional residency requirements. *Id.* § 1423(b)(1)–(2).

18 *See* Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 GEO. IMMIGR. L. J. 479, 481 (1999).

19 118 U.S. 356 (1886).

20 *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

21 *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2418–20 (2018) (upholding President Trump's travel ban on entry of noncitizens from seven Muslim-majority nations against constitutional challenge); Mathews v. Diaz, 426 U.S. 67, 81–83 (1976) (applying rational basis review to statute conditioning eligibility for Medicare Part B on five years of permanent residence); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude [noncitizens] as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 606, 609 (1889) (upholding the Chinese Exclusion Act as a valid exercise of Congress's plenary power over immigration).

naturalization was limited based on race for most of the country's history, effectively barring from citizenship Asian immigrants and others who did not come from Europe.[22]

The key modern language comes from *Mathews v. Diaz*, which upheld a statute conditioning eligibility for Medicare Part B on five years of continuous residence for permanent residents. Justice Stevens, writing for a unanimous court, noted that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[23] As a result, "the party challenging the constitutionality of the particular line Congress has drawn [between two noncitizen groups] has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some [noncitizens] from others."[24] *Mathews v. Diaz* is generally understood to require only a particularly deferential rational basis review in reviewing the majority of distinctions between noncitizen groups,[25] although distinctions based on gender have occasionally resulted in some form of intermediate scrutiny.[26]

For much of the country's history, state and federal courts had jurisdiction over petitions for naturalization.[27] But the courts were overwhelmed, and delays in adjudication were a longstanding concern.[28] As a result, in 1990, Congress created an administrative process to adjudicate naturalization petitions.[29] The current process requires a lawful permanent resident to submit a "N-400 Form" and pay a fee; eventually she will be interviewed by USCIS staff and, if granted citizenship, must take the Oath of Allegiance.[30]

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22 *See, e.g.*, United States v. Thind, 261 U.S. 204 (1923) (holding that petitioner, who came from a high-caste Indian family, was not white and therefore ineligible for naturalization).

23 *Diaz*, 426 U.S. at 79–80.

24 *Id.* at 82.

25 *See, e.g.*, HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 83–84 (2006); Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS U. L. REV. 563, 564–65 (2017) (describing an "equal protection exceptionalism" for noncitizens resulting in "an uneven and, at times, contradictory doctrine, unlike any other area of the Court's equal protection jurisprudence, that ultimately diminishes equality for immigrants").

26 *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1689–90 (2017) (holding that a derivative citizenship law that discriminated between men and women must withstand intermediate scrutiny).

27 *See* PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC 17, 18, 42–43 (2013) (describing naturalization procedures).

28 *See* S. REP. NO. 101-55, at 3–4 (1989) (noting backlogs in courts of up to two years); *see also* H.R. REP. NO. 101-187, at 8–9 (1989) (claiming administrative naturalization would remove "onerous paperwork burdens, confusing divisions of responsibilities between the Courts and the Department of Justice, and unduly lengthy processing times").

29 Immigration Act of 1990, Pub. L. No. 101-649, § 401, 104 Stat. 4978, 5038 (1990) (codified as amended at 8 U.S.C. § 1421 (2018)).

30 8 U.S.C. § 1448 (2018).

As a holdover from the prior court-based naturalization process, however, noncitizens can return to district court if a decision is delayed following their interview,[31] or if they want to challenge an eventual denial.[32]

Past naturalization statutes established a nominal fee.[33] When Congress moved the naturalization process from the courts to the administrative agency, it created an "Immigration Examinations Fee Account" and declared that "fees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants."[34] Both USCIS and the former Immigration and Nationality Service have increased fees sharply over the past three decades—from $90 in 1990 to $725 in 2016.[35]

As fees have increased, fee waivers have proven crucial to maintaining a pathway for low-income permanent residents to naturalize. For instance, in 2010, USCIS regularized what had been a mostly ad hoc fee waiver process.[36] It adopted regulations that provided for waivers for those "unable to pay the prescribed fee" for a variety of applications, including the N-400 naturalization application, and then adopted a standardized form for the waiver.[37] The regularized process made it significantly easier for low-income individuals to document their inability to pay: They only needed to show that their household income was at or below 150 percent of the federal poverty guidelines or that they received a means-tested benefit.[38]

The standardized waiver procedure may seem like a minor administrative tweak, but it made a big difference in who could naturalize. One study, for instance, found that offering fee vouchers to cover the application fee

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31 8 U.S.C. § 1447(b) (2018).

32 8 U.S.C. § 1421(c) (2018). Most of USCIS's decisionmaking is shielded by an array of jurisdiction-stripping statutes. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(B) (2018).

33 *See* Naturalization Act of June 29, 1906, § 13, 34 Stat. 596, 600 (capping fees at five dollars overall). Prior to the 1906 Act, fees were often regulated by state law and varied widely. *See* WEIL, *supra* note 27, at 18. Fees did occasionally cause controversy: The 1906 Act, for instance, capped the overall fees clerks could collect annually, meaning that after a certain point clerks would just stop working on naturalization petitions. *Id.* at 38.

34 8 U.S.C. § 1356(m) (2018).

35 *Compare* Administrative Naturalization, 56 Fed. Reg. 50,475, 50,480 (Oct. 7, 1991), *with* U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. 73,292, 73,326 (Oct. 24, 2016). The 2016 rule also included a reduced total fee of $405 for individuals with incomes between 150 and 200 percent of the federal poverty guidelines. U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. 73,292, 73,326 (Oct. 24, 2016).

36 *See* U.S. Citizenship and Immigration Services Fee Schedule, 75 Fed. Reg. 58,962, 58,974 (Sept. 24, 2010).

37 8 C.F.R. § 103.7(c)(1)(i); *see Form I-912: Request for Fee Waiver*, DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 15, 2019), https://www.uscis.gov/sites/default/files/document/forms/i-912-pc.pdf.

38 Fee Waiver Proposed Rule, *supra* note 4, at 62,298.

doubled the naturalization rate for lower-income immigrants.[39] Another study by the same researchers found that the standardized and simplified waiver procedure, which made getting a waiver significantly easier, also increased naturalization rates overall.[40]

While the Trump Administration is known for its draconian immigration policies generally, many of these policies have been specifically targeted at lower-income immigrants.[41] Citizenship has real benefits for lower-income individuals: it provides an important level of security, reducing the risk of exploitation and resulting in a significant increase in earning potential over time.[42] But the Trump Administration has also shown a willingness to undermine naturalized citizenship overall, primarily through dramatically expanded civil denaturalization efforts.[43]

USCIS announced in November 2019 that it would be increasing fees across the board for various applications and immigration benefits. At the same time, it moved to abolish fee waivers for all applications, except for those where it was statutorily required to adjudicate for free.[44] The agency argued that Congress did not require any meaningful fee waiver, and it claimed that waivers cost the government millions of dollars in fees.[45] The agency claimed that its proposals would make its fees "more equitable for all applicants and petitioners," because those who could pay would allegedly no longer have to shoulder the costs of applications granted with a fee

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39 Jens Hainmueller, Duncan Lawrence, Justin Gest, Michael Hotard, Rey Koslowski & David D. Laitin, *A Randomized Controlled Design Reveals Barrier to Citizenship for Low-income Immigrants*, 115 PNAS 939, 941 (2018) (concluding that findings "suggest that the financial barrier is a real and binding constraint for low-income [lawful permanent residents] who demonstrated a desire for citizenship and had access to application assistance").

40 Vasil Yasenov, Michael Hotard, Duncan Lawrence, Jens Hainmueller & David D. Laitin, *Standardizing the Fee-waiver Application Increased Naturalization Rates of Low-income Immigrants*, 116 PNAS 16,768, 16,768 (2019) (finding that the fee-waiver reform led to 73,000 more immigrants gaining citizenship).

41 *See, e.g.*, Cook Cty. v. Wolf, 962 F.3d 208, 215 (7th Cir. 2020) (describing the new "public charge rule" barring from eligibility for lawful permanent resident status those who use public benefits); *see also* Executive Office for Immigration Review, Fee Review, 85 Fed. Reg. 11,866, 11,866 (proposed Feb. 28, 2020) (dramatically increasing fees to appeal asylum denials); Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62,374, 62,375 (proposed Nov. 14, 2019) (preventing asylum seekers from working for longer periods of time).

42 *See generally* MANUEL PASTOR & JUSTIN SCOGGINS, CITIZEN GAIN: THE ECONOMIC BENEFITS OF NATURALIZATION FOR IMMIGRANTS AND THE ECONOMY (2012), https://dornsife.usc.edu/assets/sites/731/docs/citizen_gain_web.pdf.

43 *See* Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402, 402 (2019); *see also* Amanda Frost, *Alienating Citizens*, 114 NW. L. REV. ONLINE 48, 48 (2019).

44 Fee Waiver Proposed Rule, *supra* note 4, at 62,299.

45 *Id.* at 62,298. Notably, the agency did not disaggregate *which* applications led to the costs but considered only fee waivers across the board.

waiver.[46]

In the last decade, between 620,000 and one million individuals have naturalized annually.[47] From 2017 to 2020, twenty-eight to forty percent of these naturalization applicants relied on fee waivers.[48] With the new rules in effect,[49] there is a very real chance that individuals will be denied naturalization—along with the right to vote and other rights attendant on citizenship—solely because they are not able to pay thousands of dollars in fees.[50]

II
GRIFFIN AND *BEARDEN*: ABILITY-TO-PAY AND THE HYBRID EQUAL PROTECTION AND DUE PROCESS ANALYSIS

As the burgeoning caselaw and scholarly literature wrestling with ability-to-pay claims indicate, conditioning access to fundamental rights and government services solely on an individual's financial status raises serious constitutional considerations.[51] Yet ability-to-pay claims do not always easily fit within modern frameworks of constitutional analysis.[52] This is due to the Supreme Court's longstanding insistence, evident in *San Antonio Independent School District v. Rodriguez*, that wealth and class are not suspect

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46 *See id.* at 62,300.

47 *See* Brittany Blizzard & Jeanne Batalova, *Naturalization Trends in the United States*, MIGRATION POL'Y INST. (July 11, 2019), https://www.migrationpolicy.org/article/naturalization-trends-united-states-2017#HistoricalTrends.

48 *See* OFFICE OF THE CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, DEP'T OF HOMELAND SEC., ANN. REP. 2020, at 17 (2020), https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf (stating that between January 2017 and March 2020, approximately twenty-eight percent of naturalization applicants were eligible for fee waivers); OFFICE OF THE CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, DEP'T OF HOMELAND SEC., ANN. REP. 2018, at 27 (2018), https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb_2018-annual-report-to-congress.pdf (stating forty percent of applicants used fee waivers in 2017). An additional 14,000 individuals took advantage of the reduced fee adopted in 2016. OFFICE OF THE CITIZENSHIP AND IMMIGRATION SERVS. OMBUDSMAN, DEP'T OF HOMELAND SEC., ANN. REP. 2020, *supra*, at 17.

49 The fee schedule is currently enjoined in its entirety as of publication. *See* Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs., No. CV 19-3283 (RDM), 2020 WL 5995206, at *3, *33 (D.D.C. Oct. 8, 2020); Immigrant Legal Res. Ctr. v. Wolf, No. 20-CV-05883-JSW, 2020 WL 5798269, at *20 (N.D. Cal. Sept. 29, 2020).

50 In studies conducted before the fee rule was announced, for instance, "provision of fee waivers 'roughly doubled the rate of naturalization applications.'" Hainmueller et al., *supra* note 39, at 941.

51 *See, e.g.*, Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55 (2019); Louis Fisher, *Criminal Justice User Fees and the Procedural Aspect of Equal Justice*, 133 HARV. L. REV. F. 112 (2020); Garrett, *supra* note 8; *see also infra* notes 53–63 and accompanying text.

52 *See* Robinson v. Purkey, 326 F.R.D. 105, 149 (M.D. Tenn. 2018) (noting aspects of *Griffin* "that seem to pose a challenge in terms of reconciling the case with the rules that govern constitutional cases today").

classifications that warrant heightened scrutiny.[53] However, when a regulation implicates a wealth classification *and* the ability to exercise a fundamental right—particularly, the right to vote or access to justice in criminal or quasi-criminal judicial proceedings—courts sometimes deploy a hybrid equal protection and due process analysis, considering the nature of a substantive right alongside the individual's financial status and their ability to pay the fine or fee.[54] This hybrid analysis will result in heightened scrutiny when a fundamental right is at issue.[55]

Under the *Griffin* and *Bearden* line of cases, courts recognize that government actions that normally might be licit as a matter of due process may become illicit when an applicant or defendant is poor, ultimately rendering the process unconstitutional as applied to those unable to pay.[56] *Griffin* addressed Illinois's requirement that criminal defendants pay for a transcript of the trial in order to appeal its results.[57] Relying on its past caselaw, the Court noted that Illinois was not obligated under the U.S. Constitution to provide for appellate review.[58] But once the state provided review to *some* defendants, it could not administer the system "in a way that discriminates against some convicted defendants on account of their poverty."[59] In the words of the Court, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[60] Along similar lines, in *Bearden*,

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53 411 U.S. 1, 28 (1973) (holding that a classification against an undeniably economically disenfranchised group did not merit strict scrutiny because the class was not saddled with "a history of purposeful unequal treatment" and/or had not been "relegated to such a position of political powerlessness").

54 *See* M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) ("[T]he Court's decisions concerning access to judicial processes, commencing with *Griffin* . . . reflect both equal protection and due process concerns."); Bearden v. Georgia, 461 U.S. 660, 665 (1983) ("Due process and equal protection principles converge in the Court's analysis . . . ."); Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("[A]t all stages of the proceedings the Due Process and Equal Protection Clauses protect [indigent] persons . . . from invidious discriminations.").

55 *See M.L.B.*, 519 U.S. at 124 (holding that where the "basic right[s]" to "political process[]" participation and "access to judicial processes" in criminal cases or quasi-criminal cases are at stake, individuals exist within a penumbra protected by both the Due Process and Equal Protection Clauses).

56 *See, e.g.*, Colgan, *supra* note 51, at 61–63, 63 n.23 ("[T]he *Bearden* line . . . suggests that the Court has departed [in the context of the criminal justice system] from the traditional tiers of scrutiny approach."); Recent Case, Fowler v. Benson, 133 HARV. L. REV. 2411, 2415 (2020) ("In the *Griffin* line of cases . . . the Supreme Court applied a heighted level of scrutiny to deprivations that would seemingly receive rational basis review, if not for disproportionate effects on low-income individuals."); *see also* Fowler v. Benson, 924 F.3d 247, 271 (6th Cir. 2019) (Donald, J., dissenting) (quoting Williams v. Illinois, 399 U.S. 235, 242 (1970)) (arguing that *Griffin* established a clear joint due process and equal protection framework for evaluating financial burdens imposed on indigent defendants).

57 *Griffin*, 351 U.S. at 13–15.

58 *Id.* at 18 ("[A] State is not required by the Federal Constitution to provide . . . a right to appellate review at all.").

59 *Id.*

60 *Id.* at 19.

the Court held that an individual could not have their probation revoked, and thus face additional jail time, for failure to pay a fine they genuinely could not pay.[61] *Griffin* and *Bearden* therefore stand, in part, for the proposition that the combination of an individual's financial status and access to a government service can lead to a constitutional violation, even where both of those component parts by themselves might not.

Deploying the *Griffin-Bearden* framework, courts have struck down a wide range of state actions, policies, and procedures that failed to take into account an individual's ability to pay.[62] The analysis has been increasingly important to challenging the impacts of criminal justice debt, such as conditioning access to a driver's license on payment of that debt[63] or jailing individuals for failing to pay fines or fees.[64]

A. Florida's Felony Disenfranchisement Provisions

One illustrative site for analysis is felony disenfranchisement

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61 *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983) (holding that the failure to take into account a defendant's ability-to-pay in a probationer's revocation proceeding for failure to pay a fine "would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine" and that this deprivation would contravene "fundamental fairness required by the Fourteenth Amendment").

62 *See, e.g.*, Burns v. Ohio, 360 U.S. 252, 258 (1959) (appeal rights); O'Donnell v. Harris Cty., 892 F.3d 147, 161–62 (5th Cir. 2018) (bail); United States v. Parks, 89 F.3d 570, 572 (9th Cir. 1996) (sentencing enhancement for failure to pay fine and fees in prior case); Schultz v. Alabama, 330 F. Supp. 3d 1344, 1371 (N.D. Ala. 2018) (bail). Ability-to-pay considerations have also been a factor in challenges to immigration detention. *See* Abdi v. Nielsen, 287 F. Supp. 3d 327, 335, 338–39 (W.D.N.Y. 2018) (surveying ability-to-pay case law and concluding that an immigration judge's "failure to consider ability to pay . . . raises serious due process concerns"); *see also* Dubon Miranda v. Barr, No. 20-1110, 2020 WL 2794488, at *12 (D. Md. May 29, 2020) ("[T]he lead plaintiffs have shown a likelihood of success on the merits of their claim that due process requires a § 1226(a) bond hearing where the [Immigration Judge] considers a noncitizen's ability to pay . . . .").

63 *See, e.g.*, Robinson v. Purkey, 326 F.R.D. 105, 153–56 (M.D. Tenn. 2018), *rev'd sub nom.* Robinson v. Long, 814 F. App'x 991, 994–95 (6th Cir. 2020) (applying *Griffin* to Tennessee's license-suspension system which imposed a greater sanction on indigent violators). *But see* Fowler v. Benson, 924 F.3d 247, 260–61 (6th Cir. 2019) (holding that *Griffin* was distinguishable from Michigan's license-suspension procedure because "none of the *Griffin* cases concerned a property interest" and that *Bearden* did not control because it merely dealt with the procedures required for revoking a defendant's probation, not the procedures required for suspending a driver's license). The Sixth Circuit ultimately reversed the District Court's holding in *Robinson*, finding that rational basis applied and that the state's interest in collecting traffic debt supported the suspension policy. Robinson v. Long, 814 F. App'x 991, 994–95 (6th Cir. 2020) (holding that the license-suspension program at issue in *Robinson* is indistinguishable from the one at issue in *Fowler* and reversing the lower court).

64 *See, e.g.*, Fant v. City of Ferguson, 107 F. Supp. 3d 1016, 1031 (E.D. Mo. 2015) (citing Bearden, 461 U.S. at 665, 674) ("[F]ederal courts have repeatedly held that jailing persons who are unable to pay a court-ordered fine, without first inquiring into their ability to pay and considering alternatives to imprisonment, violates both the Due Process and Equal Protection Clauses.").

generally[65] and, in particular, recent litigation about Florida's Amendment 4. Like many states, Florida prevented formerly-incarcerated individuals from voting.[66] In 2018, however, nearly sixty-five percent of voters approved Amendment 4,[67] a state constitutional amendment requiring that "any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored *upon completion of all terms of sentence including parole or probation*."[68] The provision should have been self-executing,[69] but in 2019 the Florida Legislature passed a bill that defined "completion of all terms of sentence" as including most financial obligations imposed at sentencing, including fines, fees, costs, and restitution.[70]

Litigation ensued.[71] In almost any context, conditioning an individual's right to vote on payment of a certain sum of money would be subjected to strict scrutiny under the Fourteenth Amendment or regarded as a poll tax and struck down based on the Twenty-Fourth Amendment.[72] But, given the

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65 *See generally* CAMPAIGN LEGAL CTR. & CIVIL RIGHTS CLINIC AT GEORGETOWN LAW, CAN'T PAY, CAN'T VOTE: A NATIONAL SURVEY ON THE MODERN POLL TAX 16–33 (2019), https://campaignlegal.org/sites/default/files/2019-07/CLC_CPCV_Report_Final_0.pdf (surveying the landscape of recent payment restrictions on poll access throughout the United States and arguing that poll taxes have returned in forty-eight states in all-but name); Colgan, *supra* note 51, at 149–89 (cataloguing all state laws attaching financial disincentives on access to voting).

66 *See* Johnson v. Governor of Fla., 405 F.3d 1214, 1214 (11th Cir. 2005); Jones v. DeSantis, No. 4:19-cv-00300, 2020 WL 2618062, at *3 (N.D. Fla. May 24, 2020) [hereinafter *Jones* Trial Decision]. For information about felony disenfranchisement by state, see Colgan, *supra* note 51 at 149–89. *See also* Jones v. Governor of Fla., 950 F.3d 795, 801 nn.2–3 (11th Cir. 2020) [hereinafter *Jones* Injunction Appeal]; JEAN CHUNG, FELONY DISENFRANCHISEMENT: A PRIMER (2019), https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf; *Felon Voting Rights*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 1, 2020), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.

67 Samantha J. Gross, *Florida Voters Approve Amendment 4 on Restoring Felons' Voting Rights*, MIAMI HERALD (Nov. 7, 2018), https://www.miamiherald.com/news/politics-government/election/article220678880.html.

68 FLA. CONST. art. VI, § 4 (emphasis added); *see also Jones* Trial Decision, No. 4:19-cv-00300, 2020 WL 2618062, at *3.

69 Under Florida law, "constitutional provisions are presumed self-executing to prevent the Legislature from nullifying the will of the people as expressed in their Constitution." Browning v. Fla. Hometown Democracy, Inc., PAC, 29 So. 3d 1053, 1064 (Fla. 2010). The state's legislature may only enact statutes addressing such constitutional provisions if they "supplement, protect, or further the availability of the constitutionally conferred right, but the Legislature may not modify the right in such a fashion that it alters or frustrates the intent of the framers and the people." *Id.*

70 S.B. 7066, 2019 Leg. (Fla. 2019); *see also Jones* Trial Decision, No. 4:19-cv-00300, 2020 WL 2618062, at *4 (recounting legislation). The Florida Supreme Court later determined, in an advisory opinion, that terms of sentence within the meaning of Amendment 4 include legal financial obligations. *Advisory Op. to the Governor Re: Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070, 1074–75 (Fla. 2020).

71 *See Jones* Trial Decision, No. 4:19-cv-00300, 2020 WL 2618062, at *1–2 (describing consolidation of five cases, first for case-management purposes, and later for trial).

72 *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) ("We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.").

Supreme Court's decision in *Richardson v. Ramirez*,[73] felony disenfranchisement provisions are often reviewed only for a rational basis.[74] The logic is that a conviction somehow extinguishes the fundamental nature of enfranchisement, and once extinguished the right to re-enfranchisement becomes "a mere benefit that . . . [a state] can choose to withhold entirely" as long as it has some rational basis to do so.[75] In reviewing the plaintiffs' motion for a preliminary injunction, then, the district court applied rational basis review, but still issued a preliminary injunction.[76]

A panel of the Eleventh Circuit upheld the preliminary injunction.[77] The court expressed doubts that the prohibition could withstand rational basis review, at least when considering someone truly unable to pay the past fees.[78] The state could likely not base the continuing disenfranchisement on its interest in ensuring payment of restitution and other financial obligations because collection is "obviously futile" for those who cannot pay; there is only the deprivation of the right without any possibility of repayment.[79] Any deterrence value the state could point to had already been extinguished, and individuals would be punished more harshly because of their wealth, independent of their actual culpability.[80]

Ultimately, however, the court applied a heightened standard of review. It noted that caselaw required more searching review of wealth classifications for the administration of criminal justice and access to the franchise, and Florida's re-enfranchisement scheme implicated both.[81] For criminal justice issues, *Griffin* and *Bearden* applied and required the repayment

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73 418 U.S. 24, 56 (1974).

74 *See* Johnson v. Bredesen, 624 F.3d 742, 746 (6th Cir. 2010) ("Having lost their voting rights, Plaintiffs lack any fundamental interest to assert."); Harvey v. Brewer, 605 F.3d 1067, 1081 (9th Cir. 2010) ("The Fourteenth Amendment permits States to disenfranchise felons, regardless of whether their offenses were recognized as felonies at common law. Requiring felons to satisfy the terms of their sentences before restoring their voting rights is rationally related to a legitimate state interest . . . .").

75 *Harvey*, 605 F.3d at 1079; *see also* Jones v. DeSantis, 410 F. Supp. 3d 1284, 1300 (N.D. Fla. 2019) [hereinafter *Jones* Injunction Ruling].

76 *Jones* Injunction Ruling, 410 F. Supp. 3d at 1300–01. The trial court based its conclusion chiefly on a footnote from a previous Eleventh Circuit case, *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005), which stated that "[a]ccess to the franchise cannot be made to depend on an individual's financial resources." The Eleventh Circuit upheld Florida's felony disenfranchisement provisions at that point in part "[b]ecause Florida does not deny access to the restoration of the franchise based on ability to pay. . . ." *Id.*

77 *Jones* Injunction Appeal, 950 F.3d 795 (11th Cir. 2020).

78 *Id.* at 809. The court concluded there was little doubt the provisions would fail rational basis for the named plaintiffs, but it could not decide the appeal on those grounds without more information about the class as a whole. *Id.* at 813, 816.

79 *Id.* at 810–11; *see also* Robinson v. Purkey, 326 F.R.D. 105, 154 (M.D. Tenn. 2018) (applying rational basis but rejecting "the state's policy of suspending the license of every driver about whom it receives a notice of nonpayment, without any inquiry into the driver's indigence").

80 *Jones* Injunction Appeal, 950 F.3d at 812.

81 *Id.* at 818–20.

provisions be enjoined. But "even more significantly," increased scrutiny was required[82] because the provisions affected access to the franchise:

> The long and short of it is that once a state provides an avenue to ending the punishment of disenfranchisement—as the voters of Florida plainly did—it must do so consonant with the principles of equal protection and it may not erect a wealth barrier absent a justification sufficient to overcome heightened scrutiny.[83]

The court therefore upheld the injunction, noting that while many distinctions relating to felony disenfranchisement might be upheld, or reviewed under rational basis review alone, distinctions based on individuals' wealth could not.[84]

In April 2020, the trial court struck down the wealth requirements following trial and issued a permanent injunction.[85] The Eleventh Circuit chose to skip panel review altogether, hearing the state's appeal for the first time en banc.[86] In a 6–4 vote that fell along party lines, the circuit reversed the district court and vacated the injunction.[87]

The majority reversed the panel's prior holdings as to the ability-to-pay claim. In contrast to the panel's decision, the majority concluded that "[t]he only classification at issue is between felons who have completed all terms of their sentences, including financial terms, and those who have not."[88] So framed, the decision avoided any discussion about individuals who could not afford to pay those financial terms, despite that being at the heart of the plaintiffs' claims. It also allowed the majority to attempt to distinguish *Harper*: The financial obligations were just part of a criminal sentence, it claimed,

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82 *Id.* at 820.

83 *Id.* at 823.

84 *Id.*

85 *Jones* Trial Decision, No. 4:19-cv-00300, 2020 WL 2618062, at *44–47 (N.D. Fla. May 24, 2020).

86 McCoy v. Governor of Fla., No. 20-12003-AA, slip op. at 2 (11th Cir. July 1, 2020) (granting the state's petition for the initial hearing en banc); *see also* Alex Pickett, *11th Circuit Blocks Order Allowing Felon Voting in Florida*, COURTHOUSE NEWS SERV. (July 1, 2020), https://www.courthousenews.com/11th-circuit-blocks-order-allowing-felon-voting-in-florida (reporting on the 11th Circuit's decision to hear the appeal).

87 Jones v. Governor of Fla., 975 F.3d 1016 (11th Cir. 2020) [hereinafter *Jones* En Banc Opinion]. A full accounting of the majority's errors is beyond the scope of this essay, although I agree with the dissent's characterization that "[s]o much is profoundly wrong with the majority opinion that it is difficult to know where to begin." *Id.* at 98 (Jordan, J., dissenting). I merely highlight several of those errors below as they relate to the argument here. I would note that, despite the heightened election-year concerns and risk that the court's decision would throw thousands off the voter rolls, the decision fails to meaningfully engage with the record or meet many of the plaintiffs' or the dissents' arguments head-on. The cursory treatment and weak distinguishing characterizing much of the majority's opinion will thus do little to quell concerns that the decision was anything but outcome-driven.

88 *Compare id.* at 14 *with Jones* Injunction Appeal, 950 F.3d 795, 819 (11th Cir. 2020).

and were therefore "directly related to legitimate voter qualifications."[89] The majority also concluded that *Bearden* did not apply because it thought requiring individuals to meet their financial obligations did not impose additional punishment, and it read *Griffin* narrowly as only addressing access to criminal or quasi-criminal proceedings.[90]

The majority therefore applied rational basis review.[91] From there, it concluded the fee requirement was rational because the state could have concluded that individuals "who have completed all terms of their sentences, including paying their fines, fees, costs, and restitution, are more likely to responsibly exercise the franchise than those who have not."[92] It also rejected the plaintiffs' Twenty-Fourth Amendment–based arguments[93] and various others related to the Due Process Clause.[94]

B. Drawing Analogies Between Disenfranchisement and Naturalization

The point of discussing Amendment 4 at length is not to argue that lawful permanent residents and those with unpaid criminal justice debts are identically situated. For individuals with criminal justice debt, for instance, there are important due process concerns related to conditioning *punishment* on financial status, and those concerns are not implicated for those looking to naturalize. On the other hand, naturalization does not involve the same state interest in punishment that may be implicated when the fine or fee at issue has arisen as a result of a criminal sanction.[95]

Rather, the discussion above highlights an additional context where an individual might still be forced to pay significant sums of money to access the right to vote. Both contexts involve individuals who, under governing caselaw, might have limited claims to the full remit of equal protection that would otherwise apply to the right to vote. But placed side by side, naturalization and felony disenfranchisement highlight the opportunities and challenges presented by this type of constitutional analysis.

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89 *Jones* En Banc Opinion, 975 F.3d at 1031 (citing Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966)).

90 *See id.* at 1032–33 (citing Bearden v. Georgia, 461 U.S. 660, 667–69 (1983) and Griffin v. Illinois, 351 U.S. 12 (1956)). The decision handles *Griffin* and *Bearden* as two separate lines of cases.

91 *Id.* at 1033.

92 *Id.* at 1035.

93 *See id.* at 1037–46 (explaining that court costs and fees do not qualify as poll taxes under the Twenty-Fourth Amendment).

94 *See id.* at 1046–49 (explaining that Florida's reenfranchisement laws did not violate the Due Process Clause).

95 *See id.* at 1035 (concluding that Florida has a rational state interest in overseeing which felons are "more likely to responsibly exercise the franchise"); *see also* Fowler v. Benson, 924 F.3d 247, 262 (6th Cir. 2019) ("The state has a general interest in compliance with traffic laws.").

Courts must first decide which level of scrutiny applies, a threshold determination that will often dictate the outcome of a given case. The *Jones* injunction panel, for instance, concluded that heightened scrutiny was required. The en banc Eleventh Circuit erroneously reversed that holding, based in part on its failure to understand the correct equal protection inquiry at issue and by misreading Supreme Court caselaw. The majority relies on *M.L.B.*, for instance, to claim that "[o]utside of narrow circumstances, laws that burden the indigent are subject only to rational basis review."[96] But it fails to wrestle with the fact that the "basic right to participate in political processes as voters and candidates" is one of *M.L.B.*'s two paradigmatic exceptions where heightened scrutiny applies.[97] Furthermore, the majority opinion based its reasoning in part on its conclusion that those convicted of felonies no longer possess a fundamental right to vote.[98] But even assuming that is correct, the opinion makes no attempt to reconcile its reasoning with *Griffin*'s holding that the government might still violate the Constitution in providing services or benefits not required as of right but administered in a manner that discriminates solely based on an individual's financial status.[99]

For naturalization, *Mathews v. Diaz* adds an additional wrinkle. As addressed above, the decision is generally understood to require distinctions drawn by Congress between different groups of noncitizens to withstand rational basis review. But I would note two ways in which the fee regulations might be distinguished. First, it is not *Congress* that is doing the discriminating. Even in allowing USCIS to collect fees in general, Congress appeared to contemplate that some applications would be free.[100] It is not the same as in *Mathews*, where the Court was addressing an express distinction drawn via legislation. Second, *Mathews v. Diaz*'s holding as to standard of review dealt only with Congress's distinctions among lawful permanent residents for the purposes of administering public benefits outside the immigration system.[101] Even then, *Mathews v. Diaz*'s concern is ultimately about distinctions that may be drawn between different groups of noncitizens for government benefits, not necessarily about two similarly situated groups of

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96 *Jones* En Banc Opinion, 975 F.3d at 1030 (citing M.L.B. v. S.L.J., 519 U.S. 102, 123–24 (1996)).

97 *M.L.B.*, 519 U.S. at 124.

98 *See Jones* En Banc Opinion, 975 F.3d at 1029–30 ("States may unquestionably require felons to complete their terms of imprisonment and parole before regaining the right to vote.").

99 Griffin v. Illinois, 351 U.S. 12, 18 (1955) (explaining that states cannot grant appellate review "in a way that discriminates against some convicted defendants on account of their poverty").

100 *See* 8 U.S.C. § 1356(m) (2018). The statutory provision explicitly contemplates that fee levels generally must be calibrated to a "level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants." *Id.*

101 426 U.S. 67, 78 (1976).

noncitizens applying for a given immigration status. The decision's brief mention of the substantive naturalization requirements is therefore merely dicta.[102] Even following *Mathews v. Diaz*, the Court has applied heightened scrutiny to congressionally-drawn citizenship and naturalization provisions that draw distinctions based on gender, albeit in a different statutory context.[103] One could argue, then, that a court reviewing the fees could distinguish *Mathews v. Diaz* and apply some form of heightened scrutiny.

Regardless of what level of scrutiny applies, however, the ability-to-pay caselaw helps clarify several key points regarding the equal protection analysis that should be applied to USCIS's fees and, in particular, its abolition of a meaningful waiver. First, skeptics would likely argue that the fact that rights attach with naturalization does not yield a fundamental right to naturalize. But *Griffin* makes clear that regardless of whether any individual is entitled to naturalize as of right, the government cannot draw distinctions based solely on wealth once it undertakes to provide a process for naturalization.[104]

Second, the proper question ultimately is not whether USCIS has the authority to set a fee in the first place. Congress provided that authority—at least to collect fees on the basis of covering the costs of the system as a whole.[105] And fees have long been collected as part of the naturalization process. But just because USCIS has the authority broadly does not necessarily allow it to wield that authority in a discriminatory manner. The proper inquiry is whether it can deny access to citizenship, voting, and the other attendant rights solely because an applicant cannot afford the fee.[106]

Third, the caselaw helps clarify the correct comparators. USCIS frequently justifies its policies by claiming the authority to discriminate between citizens and noncitizens, or groups of noncitizens with different

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102 *Id.* at 79–80.

103 *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693–96 (2017) (striking down certain statutory immigration provisions that differentiated based on gender).

104 *Cf.* Griffin v. Illinois, 351 U.S. 12, 18 (1955) (explaining that once criminal defendants have a certain right, the state cannot discriminate among them based on poverty). Individuals, at the very least, likely have a due process right to *apply* for naturalization. *See* Brown v. Holder, 763 F.3d 1141, 1147–48 (9th Cir. 2014).

105 8 U.S.C. § 1356(m) (2018) (delegating to the Attorney General the authority to set fees that "will ensure recovery of the full costs" of adjudication and naturalization services). Contrary to USCIS's interpretation, the plain text contemplates that some applicants will proceed free of cost, and is best read as allowing USCIS to set the fees to recoup expenses of the system *overall*, not that each petitioner necessarily has to pay their own costs.

106 *Cf.* Bearden v. Georgia, 461 U.S. 660, 672–73 (1983) (holding that if a probationer cannot pay despite efforts to acquire resources, the court must consider alternatives to imprisonment because deprivation of liberty solely based on inability to pay would run afoul of the Fourteenth Amendment); *Griffin*, 351 U.S. at 15 ("Petitioners . . . charge that refusal to afford full appellate review solely because of poverty was a denial of due process and equal protection.").

statuses.[107] But the relevant inquiry here is between two groups of otherwise similarly situated noncitizens: those who can afford the fee and those who cannot.[108]

Fourth, once the proper inquiry is clarified, the ability-to-pay cases highlight the irrationality of USCIS's fee schedule on the merits. There is little "rationality" connecting an individual's financial means and naturalization's purpose in allowing the recognition of new citizens with full access to the rights at issue.[109] Indeed, the poll tax caselaw allows us to see that distinctions based on wealth fundamentally differ from other distinctions, such as residency requirements, civics and language testing, or oath requirements, that Congress has drawn with regard to naturalization. One might take issue with the requirement of passing a civics test, for instance, but the government could justify that requirement, at least on constitutional terms, as ensuring that a potential citizen is relatively informed about the form and institutions of the American government they will soon participate in.[110] But an ability to pay an arbitrary amount bears no relationship to an individual's ability to perform the duties of a citizen, regardless of what standard of review is applied.[111] The conclusion that stands at the heart of *Harper* and other poll tax cases is the understanding that wealth bears no relationship to an individual's ability to exercise the franchise.[112]

The government's sole justification in the fee provisions is to account for some of the costs of adjudication. That interest is questionable on its face given the severity of the rights at stake and the fact that the government has

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107 *See, e.g.*, Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532, 38,561–62 (June 26, 2020) (claiming authority to discriminate between asylum seekers and other noncitizens or U.S. citizens as long as it does not do so based on race, national origin, or religion, and citing *Mathews v. Diaz*, 426 U.S. 67, 80–83 (1976), and *Korematsu v. United States*, 323 U.S. 214 (1944), for support).

108 The foundational error of the *Jones* majority's opinion is failing to identify the correct inquiry. The Court concluded that "[t]he only classification at issue is between felons who have completed all terms of their sentences, including financial terms, and those who have not." *Jones* En Banc Opinion, 975 F.3d 1016, 1030 (11th Cir. 2020). That is, quite simply, wrong. The plaintiffs raised an as-applied challenge for those who *cannot afford* to pay, *id.* at 1025; the relevant distinction is between two otherwise similarly situated groups who have not paid their debt, one because they are genuinely unable to.

109 *Cf. Bearden*, 461 U.S. at 666–67 (stating that the due process inquiry of whether the State may revoke probation when an indigent person is unable to pay the fine depends in part on "the rationality of the connection between legislative means and purpose").

110 Most of the other requirements may be waived. *See, e.g.*, 8 U.S.C. § 1423(b)(1) (2018) (civic and English requirements); 8 U.S.C. § 1448(a) (2018) (oath). The civics and English requirements may be waived for certain vulnerable applicants, although there has been litigation about the adequacy of these waivers. *See, e.g.*, De Dandrade v. U.S. Dep't of Homeland Sec., 367 F. Supp. 3d 174, 180 (S.D.N.Y. 2019) (discussing plaintiffs' various challenges to defendants' waiver procedures and practices).

111 *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) ("Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.").

112 *See id.*

administered the program with de minimis costs or, at the very least, a functioning waiver system for years. But it fails completely when we consider particular applicants who are indigent. Those who cannot pay the $1170 *still* cannot pay the $1170; it "erects a barrier 'without delivering any money at all.'"[113]

Notably, the government does not justify the heightened fees in terms of the wealth of naturalized citizens. That is, it does not claim that there is a value in only naturalizing individuals of means. Such a policy would be unjust, but it would also be inherently irrational because of the benefits naturalization provides. Unlike those controlled by the public charge rule, under which people are prevented from entering the United States,[114] permanent residents who are unable to afford the fee will likely just remain in the United States as green card holders. Noncitizens experience varying degrees of precarity based on their immigration status until they naturalize, and the act of naturalizing itself leads to benefits for both the individuals and their communities.[115] The recognition of the benefits of citizenship has thus led the government to *incentivize* naturalization, and if USCIS intends to break from that tradition, it would be behaving irrationally.[116]

Even under rational basis review, then, the fee proposals should be considered unconstitutional. A meaningful fee waiver could remedy that constitutional violation, however, by providing a safety valve that allows individuals who are unable to pay to naturalize. However, it is unlikely that the modern-day USCIS will awake to this reality without political change. I therefore briefly address two other avenues to ensuring access to a meaningful waiver: litigation and legislation.

III
MAINTAINING A MEANINGFUL FEE WAIVER TO REMEDY CONSTITUTIONAL ISSUES

Given the constitutional considerations involved, some safety valve should be maintained to take into account an individual's ability to pay. Maintaining a robust fee waiver system would also continue the

113 *Jones* Injunction Appeal, 950 F.3d 795, 811 (11th Cir. 2020) (quoting Zablocki v. Redhail, 434 U.S. 374, 389 (1978)).

114 *See, e.g.*, 8 U.S.C. § 1182(a)(4)(A) (2018) ("Any [noncitizen] who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.").

115 *See generally* PASTOR & SCOGGINS, *supra* note 42.

116 *Cf.* Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs., No. CV 19-3283 (RDM), 2020 WL 5995206 at *27 (D.D.C. Oct. 8, 2020) (noting that the agency previously declined to increase fees "based on the premise that large fee increases would pose an obstacle to naturalization for low-income families" and finding that the agency had failed to explain its reasons for adopting the "opposite premise" when adopting recent fee increases).

longstanding policy in favor of naturalization and maintain the benefits that naturalization brings for both newly-sworn United States citizens and their communities. In the face of the Trump Administration's push to abolish fee waivers, however, one may likely question the best way forward. I would suggest two ways: a litigation fix and a legislative one.

As to litigation, a court could order a meaningful fee waiver as a remedy or strike down the fee proposals generally and maintain the current waiver system. To be clear, the constitutional harm here is not necessarily the high fee but the high fee coupled with the inability to demonstrate that a permanent resident truly cannot afford to pay it. Claims challenging USCIS's fees and its administration of fee waivers under the Administrative Procedure Act have been met with mixed results in the past,[117] although they have been more successful as to these new fee regulations as a whole.[118] But challenges to the denial of a naturalization application have an advantage over many other issues in immigration law, at least with respect to an as-applied challenge, because individuals who have their naturalization application denied can challenge that decision in federal court.[119] The statute also expressly requires that district court review is de novo, based on the court's "own findings of fact and conclusions of law."[120] In any event, turning again to *Jones*, a court could remedy the constitutional harm and still leave significant flexibility for the agency to choose how best to implement its consideration of an applicant's financial status.[121]

But the judiciary is not the only branch that could choose to remedy the

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117 *See, e.g.*, Barahona v. Napolitano, No. 10 Civ. 1574 (SAS), 2011 WL 4840716, at *6 (S.D.N.Y. Oct. 11, 2011) (finding the USCIS fee structure permissible as a reasonable exercise of discretion).

118 In granting a preliminary injunction, for instance, one district court concluded that agency officials were not properly appointed and therefore lacked the authority to promulgate the fees, Immigrant Legal Res. Ctr. v. Wolf, No. 20-CV-05883-JSW, 2020 WL 5798269, at *7–8 (N.D. Cal. Sept. 29, 2020) (citing Casa de Maryland, Inc. v. Wolf, No. 8:20-cv-02118-PX, 2020 WL 5500165, at *21 (D. Md. Sept. 11, 2020)); that the rule failed to address or disclose relevant data, including information about waivers, *id.* at *13; and that the agency had failed to adequately explain its rationale for shifting fee policies. *Id.* at *16. Another court also considered that the agency had been presented information "regarding the elasticity of demand among low-income applicants for naturalization" but had failed to adequately address elasticity in its final rule. *See Nw. Immigrant Rights Project*, 2020 WL 5995206, at *25–26. It held plaintiffs had a likelihood of success on this and other aspects, and it also enjoined the rule. *Id.* at *30, *33. Litigation is ongoing.

119 *See* 8 U.S.C. § 1421(c) (2018) (providing that anyone "whose application for naturalization . . . is denied . . . may seek review of such denial before the United States district court for the district in which such person resides"); *see also* Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447, 449 (2007) (describing district court de novo review of citizenship denials).

120 8 U.S.C. § 1421(c) (2018).

121 *See Jones* Injunction Appeal, 950 F.3d 795, 829–30 (11th Cir. 2020) (describing how the district court's injunction did not require the state "to employ any particular procedures" but to "make only a good faith effort" to ensure individuals were not prevented from voting solely due to a "genuine inability to pay").

harm. The fees are also related to a broader structural-design flaw with USCIS: it is a fee-funded agency. Ninety-five percent of its funding comes from user-generated fees, a fact that has served as continued justification for ever-increasing fees.[122] The Trump Administration has shown a willingness to weaponize the agency's budget to implement nativist policies by other means, slowing the production of green cards as a putative cost-saving measure,[123] or threatening furloughs as a result of the COVID-19 pandemic.[124] The agency attempted to justify its new fee schedule based on an increased workload that it had caused by requiring extra steps for applicants and review by the agency.[125] The budget concerns are likely pretextual, with the goal of reducing the number of otherwise-qualified applicants who can receive benefits by making it too costly for them to apply.[126]

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122 *See* WILLIAM A. KANDEL, CONG. RESEARCH SERV., U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FUNCTIONS AND FUNDING 1 (2015), https://fas.org/sgp/crs/homesec/R44038.pdf.

123 Catherine Rampell, Opinion, *How the Trump Administration Is Turning Legal Immigrants into Undocumented Ones*, WASH. POST (July 9, 2020), https://www.washingtonpost.com/opinions/how-the-trump-administration-is-turning-legal-immigrants-into-undocumented-ones/2020/07/09/15c1cbf6-c203-11ea-9fdd-b7ac6b051dc8_story.html.

124 *See* Zolan Kanno-Youngs & Emily Cochrane, *Immigration Officers Face Furloughs as Visa Applications Plunge*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/2020/07/03/us/politics/immigration-furloughs-coronavirus.html; Eric Katz, *Homeland Security Moves Forward with 13,000 Furloughs Despite Its Improving Financial Situation*, GOV'T EXECUTIVE (July 21, 2020), https://www.govexec.com/workforce/2020/07/homeland-security-moves-forward-13000-furloughs-despite-its-improving-financial-situation/167081.

125 In a survey conducted by the Migration Policy Institute, legal providers reported that naturalization interviews have increased in length and that there has been an increase in requests for evidence. RANDY CAPPS & CARLOS ECHEVERRÍA-ESTRADA, MIGRATION POLICY INST., A ROCKIER ROAD TO U.S. CITIZENSHIP? FINDINGS OF A SURVEY ON CHANGING NATURALIZATION PROCEDURES 12, 15 (July 2020), https://www.migrationpolicy.org/research/changing-uscis-naturalization-procedures. USCIS had also adopted a policy requiring interviews for individuals seeking to adjust their status to lawful permanent resident. *Id.* at 7 (citing Policy Alert, USCIS, Adjustment of Status Interview Guidelines and Waiver Criteria (May 15, 2018), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20180515-AdjustmentInterview.pdf). These changes have not affected the naturalization approval rate, but they have likely contributed to an increasing backlog for naturalization applications. *See id.* at 7–8.

126 *See* Jerrold Nadler, Nita M. Lowey, Dianne Feinstein, Zoe Lofgren, Lucille Roybal-Allard, & Richard J. Durbin, Comments in Response to Notice of Proposed Rulemaking: U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements 11 (Dec. 30, 2019), https://judiciary.house.gov/uploadedfiles/comment_in_response_to_fee_rule.pdf ("When viewed as a whole, DHS's proposed fee increase, coupled with the elimination of most fee waivers, appears to be a pretext to make the U.S. immigration system inaccessible to working class families and children."); *see also* Letter from Patrick Leahy, U.S. Senator & Jon Tester, U.S. Senator, to Chad F. Wolf, Acting Sec'y, Dep't of Homeland Sec. & Joseph Edlow, Deputy Dir. for Policy, USCIS (July 21, 2020),

Congress should move to insulate USCIS from the political whims of the executive branch. Congressional committees have recognized the importance of fee waivers in the past,[127] and Congress could rather easily draft legislation requiring the agency to consider an individual's ability to pay the fee as part of USCIS's statutory authority. But it should also consider appropriating money to fund the agency, thus removing USCIS's reliance on user-generated fees.[128] In doing so, Congress would free the agency from any need to set policy based on budgetary pressure, while at the same time further insulating USCIS from political pressure.

CONCLUSION

In the independent contexts of wealth and felony disenfranchisement, the generally applicable equal protection standards result in weaker standards of review. But the caselaw clarifies that an inability to pay for a service or right requires a different form of equal protection analysis, *voting* (and, I have argued, naturalization) heightens the concerns at issue, and when both are implicated, conditioning rights on an individual's wealth fails even under limited scrutiny.[129]

I have attempted to show how USCIS's naturalization fees, without a meaningful waiver, violate due process and equal protection. But the fees also throw into stark relief what we are willing to accept as conditions for entrance into United States citizenship. Reframing naturalization in conversation with voting rights helps reaffirm the process's importance, and it highlights the ways in which immigration remains exceptional, with the rights of permanent residents contingent on agency and sub-agency decisionmaking with little access to review, even as they stand on the threshold of citizenship. Given the ways in which naturalization is constitutive of many other rights, irrational agency decisionmaking like the fee proposals addressed above simply should not be permissible.

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https://www.appropriations.senate.gov/imo/media/doc/USCIS%20Final%20Letter%207%2021%2020.pdf (noting that, despite USCIS's claimed deficit, the agency would actually complete the fiscal year with a surplus yet still intended to continue with furloughing staff).

127 *Cf.* H.R. REP. NO. 115-948, at 61 (2018) ("USCIS is expected to continue the use of fee waivers for applicants who can demonstrate an inability to pay the naturalization fee.").

128 *See* Juan Esteban Bedoya, Note, *Price Tags on Citizenship: The Constitutionality of the Form N-600 Fee*, 95 N.Y.U. L. REV. 1022, 1053 (2020) (describing arguments for and challenges to appropriation). Bedoya usefully analyzes a companion application—the N-600 "Certificate of Citizenship"—and argues that citizens seeking proof of their citizenship have a property right in the certificate and that high fees would raise procedural due process concerns for citizens who are applying for proof of their citizenship. *Id.* at 1042–45.

129 *See, e.g.*, *Jones* Injunction Appeal, 950 F.3d 795, 800, 814, 817–18, 820, 825 (11th Cir. 2020).